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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1776

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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v.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Petitioner Pacific Gas and Electric Company petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on January 21, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, decided *sub nom. American Smelting and Refining Co., et al. v. FPC,* not yet reported, appears as Appendix A attached hereto. The principal order of the Federal Power Commission, Opinion No. 634 issued October 31, 1972 (Appendix C), and its order denying rehearing, Opinion No. 634-A issued December 15, 1972 (Appendix D), are reported at 48 F.P.C. 931 and 48 F.P.C. 1369, respectively.

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was entered on January 21, 1974. Timely petitions for rehearing were denied by order dated February 25, 1974 (Appendix B), and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (Appendix G).

QUESTION PRESENTED

Does the Natural Gas Act permit longstanding contracts which established a pattern of natural gas allocation relied upon by millions of consumers to be overturned without a finding of unequivocal public necessity and without reasoned support for a bare assertion that bargained-for differences in service are "discriminatory"?

STATUTES INVOLVED

The statutory provisions germane to the decision of this case are Sections 4, 5 and 19 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d, and 717r. These statutory provisions are set forth in full as Appendices E, F and G, respectively.

STATEMENT OF THE CASE

This petition arises out of Federal Power Commission (Commission) action[1] which deprives California consumers of supplies of natural gas previously committed to them under long-term contracts consistently accepted by the Commission and reallocates this gas largely to the benefit of industrial customers in other states.

Pacific Gas and Electric Company (PGandE) filed a petition with the U.S. Court of Appeals for the District of

1. Commission Opinions Nos. 634 and 634-A (Appendices C and D).

Columbia Circuit for review of the Commission's action under Section 19 of the Natural Gas Act, 15 U.S.C. 717r.[2]

PGandE is a regulated public utility providing electric and natural gas service in areas of Northern and Central California which have a population of approximately 8.5 million. In the past, PGandE has received 40 percent of its natural gas supply from El Paso Natural Gas Company's (El Paso) Southern Division System. This pipeline system, extending from gas fields in west Texas to the California-Arizona border, is subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. § 717 *et seq.*).

Construction of the Southern Division System was predicated on firm contractual commitments by PGandE and Southern California Gas Company to pay for specified daily volumes of gas, regardless of their actual requirements. In order to effectuate this agreement, PGandE made fixed investments in excess of $161 million dollars.[3] In return, El Paso undertook to provide deliveries of specific quantities of natural gas, not subject to curtailment. These arrangements were consistently accepted by the Commission under Sections 4 and 7 of the Natural Gas Act, 15 U.S.C. §§ 717c and 717f.

Various customers in other states along El Paso's pipeline to California took advantage of this arrangement and avoided the liability of a fixed contractual obligation and the expenses of integrated distribution systems and storage facilities by contracting with El Paso to buy so much of

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2. PGandE's petition was consolidated with eight others seeking review of various aspects of the Commission's orders. The Court of Appeals remanded the orders on a number of issues related to the design of the curtailment plan, which are not herein challenged by PGandE.

3. Primarily, 500 miles of tandem pipeline and associated storage facilities. Indeed, PGandE's initial investment for a pipeline to connect with El Paso's system exceeded El Paso's. 8 FPC 726, 728-729 (1949).

the gas as they desired on a given day, subject, however, to curtailment in the event of a failure of supply.

For over twenty years the parties operated under and relied upon these contracts. Yet, at the first onset of gas shortage, the Commission decreed a wholly new set of curtailment rules, which prescribe gas allocation solely on the basis of "end use" and which sweep aside the previously approved contracts with the naked assertion that the pre-existing plan was "discriminatory and violative of Section 4(b) of the Natural Gas Act" (Appendix C, p. 62). Petitioner contended below, as it does here, that the Commission cannot set aside filed contract provisions without a finding of unequivocal public necessity, and that this finding must be sufficiently detailed to permit reasoned evaluation of such a finding and of the new plan ordered by the Commission. The Court of Appeals held, however, that:

> "The *only* preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634" (Appendix A, p. 19; emphasis added).

REASONS FOR GRANTING THE PETITION

The decision below (1) is contrary to rulings of this Court, notably in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), which establish the pivotal importance of stable contractual relationships in the scheme of regulation under the Natural Gas Act, and (2) conflicts with the decision of another United States Court of Appeals on the issue of the findings required to support abrogation of contract provisions in gas curtailment cases. *See, International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973).

The decision below, by depriving Californians of a substantial portion of the gas supplies previously committed to them, has grave economic and environmental consequences. It substantially increases the cost of electricity

while diminishing its reliability, due to the great cost and scarcity of oil, the only alternative fossil fuel for California electric utilities. Other California industries face similar difficulties. It cannot be questioned that many millions of dollars and great economic dislocations are involved. Aside from the economic impact, the decision below inevitably results in a degradation of air quality in California's most heavily populated urban centers because of the necessity of burning more polluting fuel oil to the extent available.

Moreover, the question presented concerns an issue vital to the administration of the Natural Gas Act. At present there are approximately 25 major curtailment cases pending before the Commission.[4] However, the impact of the decision below is not limited to the instant case, or even to the numerous other curtailment cases now pending before the Commission. The unexplained overturning of the entire contractual framework of service priorities in this case throws into confusion and uncertainty the continued development of the natural gas industry upon which the entire nation depends for satisfaction of a huge share of its energy needs.

I

Decisions of this Court have established the place of contracts in the regulatory scheme established by Congress in the Natural Gas Act. In the first instance and until the Commission acts, the provision of natural gas service is fixed by individual contracts subject to change by the Commission only as needed to protect the public interest. In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 822 (1968), this Court declared:

4. FPC Docket No. R-467, Notice of Proposed Rulemaking, 38 Fed.Reg. 1517 (1973)

> "The regulatory system created by the Act is premised upon contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity."

In *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*, 350 U.S. at 339, this Court explained the reasons for this integration of private contracts and public regulation:

> ". . . only a relatively few wholesale transactions are regulated by the Natural Gas Act and these typically require substantial investment in capacity and facilities for the service of a particular distributor. Recognizing the need the circumstances create for individualized arrangements between natural gas companies, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts which to that end must be filed with the Commission and made public."

The decisions of the Commission and court below fail to analyze conflicting public interests involved (i.e., the merits of the established contractual arrangements vs. the merits of the Commission's imposed plan) and thus fail to lay the foundation required by the decisions of this Court for a change in service obligations. We do not propose to argue the merits here; it should be sufficient to observe that the Commission failed (except by a barren conclusory statement) to state any grounds for setting aside entirely the existing scheme. In the absence of a careful consideration of the merits of the contracts as they stand, the Commission had no warrant for embarking upon its *de novo* approach.

The Commission has undoubted authority to override contracts to the extent required by unequivocal public necessity, and may do so in establishing rules for the curtailment of natural gas service. The Commission's curtailment

authority, affirmed by this Court in *FPC v. Louisiana Power & Light Company*, 406 U.S. 621 (1972), is unquestioned here.

What is at issue here is the reasoning process which the Commission must follow in exercising that authority. In order to demonstrate that the required process has been followed, the Commission must present findings which are sufficient to reveal its analysis. Only with such findings can the court determine that the Commission has made "a reasonable accommodation between the interests of contract stability on the one hand and public regulation on the other". *United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra*, 350 U.S. at 344. In the instant case, the Commission failed to make or articulate any findings of fact which would support its conclusion that the pre-existing contracts were unlawful.

The essence of what the California customers bargained and paid for was reliability of service; the other customers had contractually declared themselves satisfied with the possibility of service interruptions. The arrangements had been endorsed by the Commission in numerous previous decisions and had been relied upon by El Paso's customers. Yet the apparent basis for the Commission's complete upheaval of established contractual relationships was an assumption that *any* reflection of this bargained-for difference in quality of service is "discriminatory" and therefore violative of the Natural Gas Act. This analysis is defective and incomplete.

Under the Natural Gas Act "discrimination" in the sense of mere difference is not proscribed; it is only *undue* discrimination which is unlawful. This Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp., supra*, 350 U.S. at 345, carefully distinguished between the statutory scheme of the Interstate Commerce Act which requires tariffs of general application to qualifying shippers, and the statutory

scheme of the Natural Gas Act which "recognizes the need for private contracts of varying terms and expressly provides for the filing of such contracts as a part of the rate schedules." Hence, under the Natural Gas Act it cannot be concluded that an entire set of complex contractual relationships is unduly discriminatory merely because different customers, for differing consideration, are entitled to differing qualities of service. Yet this is what the Commission held with its complete abrogation of the contractual position of the California customers.

This extreme result—the *complete* discarding of the previously established contractual relationships—is itself evidence of the Commission's failure to weigh the competing interests involved. For instance the Commission did not explain why California contract rights should be abrogated for the benefit of east-of-California *industrial* users if the purpose of departing from the contracts was to protect "*human needs*" uses of gas. All parties involved, including this Petitioner, shared the concern for protection of human needs uses. The Commission, however, went far beyond this in reallocating gas to east-of-California *industrial* uses in derogation of the established contractual patterns of use. It referred to the bare possibility that east-of-California service might be entirely curtailed while California customers might remain unaffected, but did not explain why it felt this could justify a complete abrogation of the California customers' contractual position, rather than some reasonable modification thereof.

The court below erred by accepting the Commission's sweeping and simplistic determination that the California customers' long-established contractual right to their bargained-for quality of service should be disregarded en-

tirely as "discriminatory". The lower court erroneously concludes that in order to override existing contractual arrangements pursuant to Section 5 of the Act (Appendix F):

> "The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634." [Appendix A, p. 19; footnote omitted]

Neither the Commission nor the court below acknowledged that it is only *undue* discrimination which is proscribed by Section 5 of the Act. Whether this was merely an oversight in drafting and perhaps excusable, or whether it reflects an error in reasoning, there is still no reasoned basis for the conclusion that there was *undue* discrimination. Opinion 634 does contain a "finding" that the pre-existing contracts and tariffs in effect on El Paso's Southern Division System were "discriminatory" but this "finding" is nothing more than a conclusion unsupported by findings of fact based upon substantial evidence which might explain how contracted-for differences in service could be concluded to be *per se* unduly discriminatory.

This is the crux of the issue before this Court. If established contractual relations may be wholly ignored by the Commission simply on an unsupported conclusory statement that they are "discriminatory", apparently based upon mere difference in bargained-for quality of service, then the voluntary contractual basis of Natural Gas Act regulation has been effectively destroyed. Why should distributor customers of pipelines ever again enter into long-term contracts for firm service and take on additional obligations when at the first sign of the very shortage they seek to insure against, these contracts will be ignored and these customers will be placed on exactly the same footing

as customers who have made no special commitments? Yet without these special long-term commitments, there is grave doubt that pipelines will be able to obtain financing to proceed with the large new supply projects which are now so urgently needed.

II

The treatment of the contract abrogation issue brings the Court of Appeals for the District of Columbia Circuit squarely into conflict with the recent decision of the Court of Appeals for the Fifth Circuit in *International Paper Co. v. FPC*, 476 F.2d 121 (1973). In that case the Federal Power Commission purported to override so-called "substitute fuel clauses" in gas supply contracts which provided, in essence, that the pipeline would reimburse its customer for the cost of the alternate fuels which the customer was forced, by curtailment, to substitute for its normal supply of natural gas. The Commission asserted that its approval of the pipeline's curtailment plan shielded the pipeline from liability to perform under these substitute fuel clauses, thus effectively abrogating the customer's rights under the clauses.

The Court of Appeals for the Fifth Circuit remanded the case to the Commission on this issue, holding that the Commission had failed to make the findings that would be necessary to support such an abrogation of contractual rights. In the key passage of its decision, the Fifth Circuit stated:

> "It must be recognized that there are two quite difficult determinations that the FPC must [m]ake before it can abrogate terms in private contracts even accepting the most favorable reading that the claimed power

> can be given. First, we feel it is incumbent on the agency to give clear reasons why it has determined that [the contract rights in question] are indeed 'undue preferences' within the meaning of that term in the Natural Gas Act. * * *
>
> "Secondly, we feel that the FPC must make findings and set forth its reasons for holding that abrogation of these clauses is 'in the public interest.' The FPC must show that the recognized public interests in freedom to contract and contract stability are outweighed by the public interest it seeks to assert under the Natural Gas Act." [476 F.2d at 128]

This opinion of the Fifth Circuit is entirely in accord with this Court's recognition, in the *Mobile* and *Permian* cases, of the special weight to be accorded contracts under the Natural Gas Act. *A finding of unequivocal public necessity* is a prerequisite to the abrogation of established contract rights (*Permian Basin Area Rate Cases, supra,* 390 U.S. at 822) and the Commission is required by Section 19 of the Act to base its findings of fact upon substantial evidence. Moreover, reviewing courts have a right to demand of an agency that it articulate a rational connection between the facts found and the conclusion reached so that the agency's action may be properly reviewed. *Burlington Truck Lines v. United States,* 371 U.S. 156, 167-169 (1962). This Court has specifically stated that, under the Natural Gas Act, the Commission must proffer "findings and conclusions sufficiently detailed to permit reasoned evaluation of the purposes and implications of its order." *Permian Basin Area Base Cases, supra,* 390 U.S. at 814. The Fifth Circuit in *International Paper* recognized these criteria. The Dis-

trict of Columbia Circuit, in the case at bar, did not. Thus, a clear conflict exists between the circuits.[5]

Because of the impact of this case on millions of gas and electric consumers in California, and the critical importance of the issue presented to the orderly administration of the Natural Gas Act, it is appropriate that the conflict between circuits be resolved now, in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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5. The District of Columbia Circuit sought to distinguish the Fifth Circuit's decision in *International Paper* by suggesting that the question decided in *International Paper* was whether the Commission's adoption of a curtailment plan would *ipso facto* immunize the pipeline from contractual liability absent express Commission findings on the liability issue, citing 476 F.2d at 125. *American Smelting and Refining Co., et al v. FPC*, Appendix A, pp. 18-19. With due respect to the court below, this is a misreading of the *International Paper* case where the Fifth Circuit explicitly divided its opinion into two parts. The first part of the *International Paper* decision discussed the Commission's contention, in Opinion No. 606, that the mere adoption of a curtailment plan would *ipso facto* immunize pipelines from liability. The second part of the opinion deals with the exercise of the Commission's power to overturn existing contracts, and the findings necessary to support the assertion of that power. That is precisely the issue in this case.

Appendix A

United States Court of Appeals

For the District of Columbia Circuit

No. 72-2204

American Smelting and Refining Company,
Compania Minera de Cananea, S.A. de C.V.,
Inspiration Consolidated Copper Company and
Kennecott Copper Corporation, Petitioners

v.

Federal Power Commission, Respondent

Tucson Gas & Electric Company
Johns-Manville Products Corp.
General Motors Corp.
San Diego Gas and Electric Co.
El Paso Natural Gas Co.
Southern Union Gas Co.
Shell Oil Co.
Southwest Gas Corporation
Salt River Project Agricultural
Improvement and Power District
Arizona Public Service Co., Intervenors

No. 73-1016

San Diego Gas and Electric Company, Petitioner

v.

Federal Power Commission, Respondent

Johns-Manville Products Corp.
General Motors Corp.
Tucson Gas and Electric Co.
Shell Oil Company
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Company
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and the Public
Utilities Commission of the State of California
American Smelting and Refining Co., et al,
Intervenors

No. 73-1040

Pacific Gas and Electric Company, Petitioner

v.

Federal Power Commission, Respondent

General Motors Corporation
Johns-Manville Products Corp.
Tucson Gas and Electric Co.
Shell Oil Company
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and the Public
Utilities Commission of the State of California
San Diego Gas and Electric Co.
American Smelting & Refining Co., et al,
Intervenors

No. 73-1042

Southern California Gas Company, Petitioner

v.

Federal Power Commission, Respondent

General Motors Corporation
Johns-Manville Products Corp.
Tucson Gas and Electric Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
Shell Oil Company
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California and the Public
Utilities Commission of the State of California
San Diego Gas and Electric Co.
American Smelting and Refining Co., et al
Nevada Industrial Customers, Intervenors

No. 73-1050

Southern California Edison Company, Petitioner

v.

Federal Power Commission, Respondent

Tucson Gas and Electric Co.
Shell Oil Co.
Johns-Manville Products Corp.
General Motors Corp.
Salt River Project Agricultural
Improvement and Power District
Arizona Public Service Co.
El Paso Natural Gas Co.
People of the State of California and the Public
Utilities Commission of the State of California
Southern Union Gas Co.
San Diego Gas and Electric Co.
Department of Water and Power of
the City of Los Angeles
American Smelting and Refining Co., et al
Southwest Gas Corp., Intervenors

No. 73-1102

American Smelting and Refining Company,
Compania Minera de Cananea, S.A. de C.V.,
Inspiration Consolidated Copper Company and
Kennecott Copper Corporation, Petitioners

v.

Federal Power Commission, Respondent

El Paso Natural Gas Co.
Pacific Gas and Electric Co.
Shell Oil Company
General Motors Corp.
Johns-Manville Products Corp.
Southwest Gas Corp.
San Diego Gas and Electric Co.
Southern Union Gas Co.

No. 73-1116

City of Willcox and Arizona Electric Power Cooperative, Inc., Petitioners

v.

Federal Power Commission, Respondent

American Smelting and Refining Co., et al
Johns-Manville Products Corp.
General Motors Corporation
El Paso Natural Gas Co.
San Diego Gas and Electric Co.
Southern Union Gas Co., Intervenors

No. 73-1148

Southern Union Gas Company, Petitioner

v.

Federal Power Commission, Respondent

American Smelting and Refining Co., et al
El Paso Natural Gas Co.
Tucson Gas and Electric Co.
General Motors Corp.
Johns-Manville Products Corp.
San Diego Gas and Electric Co.
Southwest Gas Corp.
Pacific Gas and Electric Co., Intervenors

No. 73-1152

Department of Water and Power of the
City of Los Angeles, Petitioner

v.

Federal Power Commission, Respondent

Shell Oil Company
El Paso Natural Gas Company
Tucson Gas and Electric Company
Southern Union Gas Corporation
General Motors Corporation
Johns-Manville Products Corp.
Air Pollution Control District of the
County of Los Angeles
American Smelting and Refining Co., et al
Southern Union Gas Co.
San Diego Gas and Electric Co., Intervenors

Petitions for Review of Orders of the
Federal Power Commission

Decided January 21, 1974

Before: FAHY, *Senior Circuit Judge,* TAMM and MACKINNON, *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* TAMM.

Concurring Opinion filed by *Senior Circuit Judge* FAHY at p. 49.

TAMM, *Circuit Judge:* We are called upon to review orders of the Federal Power Commission which establish a temporary curtailment plan for use on the Southern Division System of the El Paso Natural Gas Company. The temporary plan was approved on October 31, 1972 and will remain in effect until the Commission approves a permanent plan.[1] The purpose of a curtailment plan is to provide procedures for the allocation of gas among customers during periods of gas shortage. Much of the difficulty encountered in formulating such procedures for the El Paso system arises from the variety of customers it serves. The two California customers, Southern California Gas Company (SoCal) and Pacific Gas and Electric Company (PG&E) are partial requirements customers, i.e. El Paso is only one of the sources from which they obtain gas supplies. The customers situated in the southwestern states east of California, on the other hand, are full requirements customers. Many, if not all, of the service contracts between El Paso and its east-of-California (EOC) customers require El Paso to supply all gas requirements up to a stated daily maximum.[2] In the past, the EOC customers have borne the entire burden of service curtailments. Neither of the California customers had ever experienced any reduction of service from El Paso under former curtailment plans.[3] Not surprisingly, the alignment of the parties before us reflects this difference between the two categories of customers. The California customers object

1. The interim plan was originally supposed to expire on October 31, 1973 unless a permanent plan was approved before then. On October 18, 1973, however, the Commission extended the operation of the interim plan pending further action on a permanent plan.

2. J.A. at 735, 740, 746, 751, 757, 763, 769 and 776.

3. J.A. at 343-44, 353 (Testimony of Mr. Travis Petty).

strongly to various aspects of the temporary plan. The EOC customers generally support the temporary plan although they, too, oppose certain features.

I. Background

On April 15, 1971, the Commission issued Order No. 431, a statement of general policy. Citing recently experienced natural gas shortages,[4] the order required jurisdictional pipeline companies to take all steps necessary for protection of reliable and adequate gas service.[5] Any pipeline which expected that curtailment of service might be necessary was ordered to file tariff sheets setting forth a curtailment plan. Several months after order 431 was issued, El Paso filed proposed tariff revisions which modified the provisions in El Paso's FPC Gas Tariff governing curtailments in El Paso's Southern Division System. This matter is still pending before the Commission and no final order has been issued.

During the proceedings on the proposed revisions, however, El Paso filed a motion requesting the Commission to prescribe interim emergency curtailment procedures to be followed until the issuance of its final order. Although hearings regarding the proposed permanent plan had already been completed, they were reconvened for the limited purpose of ascertaining the need for interim curtailment procedures. Following ten days of hearings, the matter was submitted directly to the Commission, bypass-

4. Although the parties seem to agree that there is a serious shortage of natural gas, we make no assumption on this point. We pause, however, to note the following advertisement which appeared at page 23 of the Wall Street Journal on October 26, 1973: "Natural Gas—Long Term Supply Available—50 Billion Cubic Ft.—We can provide a 15 year supply at 10 million cubic ft. per day."

5. The order is codified at 18 C.F.R. § 2.70 (1973).

ing intermediate decision by the Administrative Law Judge. On October 31, 1972, the Commission issued Opinion No. 634, which (i) declared that the curtailment provisions of El Paso's tariff then in force were discriminatory and violative of the Natural Gas Act and (ii) established a temporary curtailment plan to be followed in El Paso's Southern Division until October 31, 1973 or the issuance of a final order in the proceedings, whichever should occur earlier.[6] This order and a later clarifying order are the subject of the present petitions for review.

II. The Commission's Action

In Opinion No. 634 the Commission found that, in the event of a gas shortage, El Paso's existing tariff provisions called for complete cut-off of all EOC customers, including residential and small commercial customers, before any service to California would be curtailed.[7] Thus, even industrial users in California would have priority over EOC residential users. After concluding that these provisions were discriminatory and violative of sections 4 and 5 of the Natural Gas Act, the Commission further found that an interim curtailment plan should be adopted based upon the following schedule of priorities:

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6. The expiration date has been changed. See note 1, *supra*.

7. According to the Commission's findings, the former tariff provisions required El Paso to curtail its customers in the following sequence (J.A. at 136):

> (a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G.

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feed-stock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capacity is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day) boiler-fuel use where existing alternate fuel capability is present.[8]

Under the interim plan, delivery reduction in each subordinate category must be complete before deliveries for higher priority requirements are curtailed. The stated purpose of the plan is twofold: "(1) to protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel applications where alternate fuels are available."[9] Following the issuance of Opinion 634, a number of parties requested stays, clarification, modification and rehearing. On December

8. J.A. at 144.

9. J.A. at 143-44.

15, 1972, the Commission issued Opinion 634-A, denying the requests for stay, modification and rehearing and clarifying the earlier opinion on several points.

Various parties have challenged the authority of the Commission to prescribe the interim curtailment plan, the adequacy of the fact findings upon which the plan is based and the appropriateness of the remedy it has adopted. Although we conclude that the Commission has the authority to implement interim curtailment plans pending final approval of permanent tariff provisions, we are compelled to remand this matter to the Commission because of certain defects in the orders now under review.

III. The Commission's Authority

The authority of the Federal Power Commission to regulate service curtailments by natural gas pipelines has been sustained by the Supreme Court in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The narrow question in that case was whether the FPC has jurisdiction to regulate curtailment of service to direct sales customers (as opposed to customers who purchase gas for resale). In deciding this issue in favor of the Commission, the Court provided broad guidance as to the scope of the Commission's authority. The Court found that the Commission's power to regulate curtailments is derived from two provisions of the Natural Gas Act: section 1(b), which makes the Act applicable to "the transportation of natural gas in interstate commerce," and section 16, which gives the Commission broad enforcement powers:

> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.

Id. at 638, 642. The Court also pointed out that the substantive standard for regulation of service curtailments is found in section 4(b) of the Act. *Id.* at 642. That section provides:

> No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

The general authority of the Commission to regulate curtailment plans is not questioned by the petitioners and intervenors. It is argued, however, that the Commission has exceeded this authority in issuing Opinions 634 and 634-A. This contention is directed to substantive features of the opinions as well as the procedure whereby they were issued.

A. *Interim Orders*

As explained above, the orders under review are interim orders. An interim order is one entered during the course of proceedings which resolves some of the issues while leaving others to be determined at a later time. The use of interim orders is a well established practice in rate proceedings. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 583-85 (1942); *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). Although we are not aware of any case testing the use of this device in a curtailment proceeding, Supreme Court dicta indicates that it is perfectly proper. In *Louisi-*

ana Power & Light Co., supra, the Court discussed the alternative Commission procedures available for regulation of curtailment plans. Noting the delay inherent in the section 5 procedure, the Court observed:

> Of course, even when conducting a § 5 hearing, the Commission would have emergency authority to issue interim orders effecting a curtailment plan.

406 U.S. at 644 n.18 (citation omitted). While this footnote mentions only the use of interim orders in section 5 proceedings, the technique has also been approved in proceedings under section 4, *FPC v. Tennessee Gas Co.*, 371 U.S. 145, 154 (1962). The fact that the instant proceedings were originally initiated under section 4 has no bearing on the Commission's authority to promulgate the interim orders.

The briefs reveal some confusion as to the precise basis and extent of the Commission's authority to issue interim orders. It is suggested by some parties that the Commission was exercising "emergency authority"[10] and that the interim orders were only justified to the extent necessary to meet anticipated human needs shortages.[11] We think it is important, at the outset, to correct this misunderstanding of the Commission's authority.

The Commission's power to promulgate an interim curtailment plan is not born of emergency. Rather, it is based upon the statutory authorization to perform "any and all acts" necessary or appropriate for the implementation of the Natural Gas Act. As we have stated before, of course, section 16 does not itself grant independent powers but

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10. San Diego Br. at 22; FPC Br. at 33.

11. Edison Br. at 18; San Diego Br. at 20-23; SoCal Br. at 9; Willcox Br. at 44.

merely provides for implementation of the core sections of the Natural Gas Act. *Texaco, Inc. v. FPC,* 474 F.2d 416, 420 (D.C. Cir. 1972), *cert. granted,* 42 U.S.L.W. 3194 (U.S. Oct. 9, 1973) The "core section" underlying the orders now before us is section 5(a) which empowers the Commission, on its own motion, after hearing, to correct discriminatory practices by natural gas companies. Like any order issued pursuant to section 5(a), an interim order can only issue after full hearing and must include a statement of reasons based upon findings of fact which are supported by substantial evidence in the record. No emergency can excuse these procedural requirements.

This is not to say that the exigencies of a gas supply shortage are completely irrelevant. The threat of a heating-season shortage such as that discussed in the briefs would be relevant to at least two determinations which the Commission must make: (1) whether an interim curtailment order is necessary and (2) whether a particular interim plan is just and reasonable. If, for example, there were no expectation that gas shortages would occur before a permanent plan could be formulated, then an interim order might be unnecessary, even though the existing curtailment regulations may be clearly discriminatory. Similarly, once it becomes necessary to adopt interim curtailment procedures, a plan which might not meet the "just and reasonable" standard if proferred as a final order might be acceptable as a temporary measure in light of the emergency. In short, the existence of an emergency is a factor to be considered by the Commission and by this court upon judicial review. It does not create special powers in the Commission, however, nor does it abrogate the usual procedural requirements for valid administrative action.

B. *Abrogation Of Contract Rights*

One of the most persistent objections to the Commission's curtailment plan is that it disrupts the contractual relations of the parties. The California customers point out that they have negotiated for and received firm commitments from El Paso, whereas the service to EOC customers is, by the terms of their contracts, subject to curtailment.[12] The new curtailment plan, however, requires all of El Paso's customers to share ratably the burden of any future gas shortage. According to the California customers, this deprives them of the protection from service interruptions for which they have contracted and provides a windfall to less diligent customers east of California. The short answer to this argument is that the Commission is not bound by agreements among parties subject to its jurisdiction. Section 5(a) of the Act gives the Commissioner authority to override discriminatory contractual arrangements:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification,

12. This interpretation of the El Paso service contracts is not undisputed. *See* Brief of Intervenors American Smelting and Refining Co. *et al.* at 2-9.

> rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

In issuing Opinions 634 and 634-A, the Commission was clearly acting within this provision.[13] Having found that then existing curtailment procedures for El Paso's Southern Division were discriminatory, the Commission was authorized to promulgate substitute procedures. To the extent that the illegal curtailment plan was reflected in customer service contracts, such contracts were also superseded by the Commission's orders.

Several of the parties concede the Commission's authority to override contractual arrangements, but argue that the opinions now under review lack certain threshhold findings which, they say, are a condition precedent to the exercise of that authority. These parties rely chiefly upon the following passage from *International Paper Co. v. FPC*, 476 F.2d 121, 128 (5th Cir. 1973):

> It must be recognized that there are two quite difficult determinations that the FPC must take before it can abrogate terms in private contracts even accepting the most favorable reading that the claimed power can be given. First, we feel it is incumbent on the agency to give clear reasons why it has determined that these substitute fuel clauses are indeed "undue preferences" within the meaning of that term in the Natural Gas Act. . . . .
>
> Secondly, we feel that the FPC must make findings and set forth its reasons for holding that abrogation of these clauses is "in the public interest." The FPC must show that the recognized public interests in free-

13. Opinion No. 634, ¶ 4, J.A. at 135.

> dom to contract and contract stability are outweighed by the public interest it seeks to assert under the Natural Gas Act.

Taken out of context, this language appears pertinent. A full reading of the *International Paper* case discloses, however, that the issue in that case was quite different from that presented here. The question decided in *International Paper* was whether the Commission's adoption of a curtailment plan would *ipso facto* immunize the pipe line from liability for breach of service contracts. In other words, would a pipe line be liable to its customers for non-delivery if acting in compliance with a valid Commission order which contains no express findings regarding contractual liability. The court concluded that such an order would not be an absolute defense absent express findings with respect to contractual liability. 476 F.2d at 125. Hence, the twin findings mentioned in the *International Paper* opinion are only required for the purpose of exonerating a pipe line from liability for breaches of contract which may result from compliance with Commission orders.[14] The petitions now before us do not concern the remedial rights of the pipe line and its customers *inter sese*, but the authority of the Commission to override a contractually arranged curtailment plan. On the latter question, the statute leaves no doubt. The only preliminary finding required by the statute is that the former plan was discriminatory, a finding clearly expressed in Opinion 634.[15]

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14. We express no opinion as to the correctness of the *International Paper decision*, which suggests that a pipeline whose own shortsightedness or overreaching necessitates a curtailment plan should not be immune from contractual liability. 476 F.2d at 126 n.5.

15. J.A. at 136-37.

C. *The End Use Method*

As explained above, the plan adopted in Opinion 634 establishes a schedule of priorities to be followed in allocating gas service curtailments. The differentiating factor among these priorities is "end use." Thus, the Commission has determined that certain uses of gas (e.g. use by residential and small commercial customers) should have a higher priority than others (e.g. use as boiler fuel). In the event of a shortage, customers purchasing gas for inferior uses will be completely cut off before any service to higher-priority customers is curtailed. Several parties take issue with the Commission's treatment of boiler fuel uses in this scheme. Their objections are discussed below at part V, C. For the moment we wish to take up the contention of petitioner City of Willcox that the Commission "exceeded its statutory powers by prescribing service priorities based upon the nature of end use by ultimate consumers."[16] Unlike those who merely object to the Commission's treatment of boiler fuel uses, Willcox asserts that the entire scheme of end use priorities is illegal. We disagree.

Willcox' attack on the Commission's authority is twofold. Its first contention is that end use is an improper criterion. The authorities relied upon by Willcox are inapposite, however. In *Fuels Research Council, Inc. v. FPC,* 374 F.2d 842 (7th Cir. 1967), the court approved a two-part rate structure which allocated costs among peak season customers and off-peak customers. A dissatisfied customer complained that the rate structure in question would encourage "inferior" uses of natural gas. The court replied that the Commission "is not authorized to consider the end use of natural gas in a *rate proceeding* [citation omitted] as distinguished from a certificate proceeding under section

16. Br. at 48 *et seq.*

7 of the Act." *Id.* at 854 (emphasis added). The decision does not prohibit consideration of end use in a curtailment proceeding.

Public Service Commission of the State of New York v. FPC, 463 F.2d 824 (D.C. Cir. 1972), also cited by Willcox, involved the Commission's certification of a proposed sale of natural gas for use in an oil refinery. The New York Public Service Commission sought review, arguing that the contemplated use was inferior to use by interstate residential and commercial customers. We remanded the case to the Commission for consideration of that objection.[17] The Commission sustained itself and the New York Commission again sought review. We affirmed the Commission, concluding: ". . . it cannot be said that 'a balance of *all* the circumstances' weighs against granting the certificate here." *Id.* at 829-30. It is important to note, however, that we did not disapprove consideration of end use in certification proceedings:

> In different certificate applications the factor of end use will have varying importance. In the case at bar the end use factor is not, by itself, of decisive importance. While it may be true that as to the particular natural gas involved, it would be desirable to have this gas go into the hands of residential rather than industrial users, there is no assurance that this would happen if the certificate were not granted.

Id. at 826.

Willcox' second objection to the end use method is that the plan effects a "reallocation" of gas supplies in violation of section 7(a). Willcox relies upon *FPC v. Transcontinental Gas Corp.*, 365 U.S. 1(1961). In that case the Supreme

17. *Public Service Commission of the State of New York v. FPC*, 436 F.2d 904 (D.C. Cir. 1970).

Court was called upon to review the Commission's refusal to approve a contract for the sale of natural gas to be used as boiler fuel. The Commission denied certification on grounds, *inter alia,* that the proposed use of the gas was inferior to residential needs. The Court *approved* the Commission's action, stating that end use was a proper consideration in disapproving the contemplated sale. 365 U.S. at 22. Although this holding endorses the Commission's consideration of end use, the Willcox brief directs our attention to the following admonition of the Court:

> [I]t must be realized that the Commission's powers under § 7 are, by definition, limited. [Citation omitted.] The Commission cannot order a natural gas company to sell gas to users that it favors; it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification.

Id. at 17. We reiterated that admonition in *Granite City Steel Co. v. FPC,* 320 F.2d 711 (D.C. Cir. 1963), also cited in the Willcox brief, when we disapproved the Commission's wholesale reallocation of pipe line capacity from industrial users to public utility customers. Neither that ruling nor the dictum of the Supreme Court quoted above is in point, however. Both opinions were concerned with section 7(a) which prohibits the Commission from compelling a natural gas company to sell natural gas when to do so would impair service to existing customers. As we stated in *Granite City:*

> The theory and purpose of the statutory restriction appear to be that persons desiring gas *for the first time,* or desiring *more* gas, should not get it by taking it away from existing lawful customers.

320 F.2d at 713 (emphasis added). Quite clearly, this statutory restriction is not infringed by a curtailment plan based on end use. The curtailment plan does not order the sale of additional gas to one customer to the detriment of another. Rather, it prescribes a formula for allocating insufficient supplies among existing customers. We are not unmindful of Willcox' argument that *the effect* of the interim plan under review is the same as an order reallocating gas supplies from one customer to another, since the former curtailment plan would have protected the California customers from service curtailments. Even if this is true, however, we do not think the statutory prohibition applies to curtailment plans. Section 7(a) is plainly intended to regulate *expansions* of service. The prohibitory proviso we have been discussing must be read in that context. If this clause is construed to forbid approval of any curtailment plan which effects a shifting of the burden of future gas shortages, then the Commission would be powerless to regulate curtailments. Such a result would obviously be at odds with the Supreme Court's holding in *Louisiana Power & Light, supra.*

We conclude, therefore, that the curtailment plan now under review does not violate the section 7(a) prohibition against reallocation of gas service and is not inconsistent with previous decisions regarding the propriety of end use criteria in the regulation of the natural gas industry. Indeed, we think end use is a most appropriate consideration for purposes of a curtailment plan.

IV. The Commission's Findings Of Fact

Several of the parties maintain that certain of the Commission's fact findings are not adequately supported by the evidence. The standard of our review in such matters is defined by the Natural Gas Act, section 19(b):

> The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

A. *Findings Regarding The Former Plan*

In Opinion No. 634 the Commission found that, under tariff provisions then in effect, El Paso's California customers would be protected from service curtailments until all service to EOC customers had been completely cut off. As a result, the Commission found, human needs customers (residential and small commercial customers) in one part of the El Paso system would be subordinate to industrial customers in another part in the event of a severe gas shortage. That the Commission's concern was more than merely theoretical is apparent from the following statement:

> The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California would probably be curtailed not at all.

J.A. at 137. Based upon these findings, the Commission concluded that the curtailment provisions of El Paso's tariff were discriminatory under sections 4 and 5 of the Natural Gas Act.

We think the Commission's findings as to the effect of El Paso's former curtailment plan are, for the most part, sustained by substantial evidence in the record. Exhibit 237[18]

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18. "Summary of Estimated Monthly Mainline Requirements, Curtailment and Sales for the Period November 1, 1972 through October 31, 1973 Based on El Paso's Currently Effective Tariff," Prepared by El Paso Natural Gas Co., J.A. at 651 *et seq.*

before the Commission indicates that, under the former plan, EOC customers would have borne the entire burden of estimated curtailments for the twelve-month period commencing on November 1, 1972, while service to California remained undisturbed. On a peak day, deliveries to EOC distributors for resale to residential and commercial customers would have been curtailed by about 25%, according to the estimate, and EOC direct industrial customers would have been completely shut off.[19] In addition, there would have been some amount of EOC curtailment on virtually every other day of the year.[20] This evidence was summarized by one of El Paso's witnesses at the hearings:

> Q. And what conclusion do you draw from, or would you have us draw from, the showings made in [Exhibit 237, Schedule 1]?
>
> A. I can tell you what conclusions I draw from the information shown there, and that is significant curtailment of the customers east of California, of the commercial and residential component of the requirements on a peak day, and full service to California, and significant industrial and irrigation curtailments to the east of California customers on the average days throughout the year, while full service is being rendered to the California customers by El Paso.

J.A. at 542. Several petitioners challenge these estimates, stating that supplies have been underestimated and peak day demands exaggerated. The maximum demand estimate is, in fact, based upon a hypothetical coincidence of peak

19. J.A. at 477 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

20. Exhibit 237, Schedule 1, pp. 14-17, J.A. at 665-68; J.A. at 477 (Testimony of M.K. O'Toole of El Paso Natural Gas Co.).

demand days throughout the El Paso system.[21] Such an eventuality is so improbable, it is argued, that there is no substantial evidence to support the Commission's forecast of commercial and residential curtailments east of California. We think that the evidence supports the Commission. There was credible testimony that the weather conditions required for a systemwide coincidence of peak demand had in fact occurred in the past and were likely to occur again.[22] Moreover, the forecasting of demand for natural gas is a matter within the peculiar expertise of the Commission and cannot lightly be upset by a reviewing court.

The estimated supply figures presented by El Paso are questioned because they fail to include two sources of gas. The first of these is withdrawal of gas from certain wells in excess of amounts allowed by various state regulatory authorities. There was reliable testimony, however, to the effect that "exceeding allowables" is a short-term emergency measure involving potential adverse effects upon supplies in the future.[23] The Commission was not required to insist that this resource be exhausted before it could conclude that EOC commercial and residential customers were in danger of curtailment. The second source of gas not included in the supply estimate is gas which would be made available through curtailment of "field sales." Even taking into account curtailments of field sales, however, it is clear that severe curtailment of EOC customers would have persisted. The proposed curtailment of field sales could only provide an additional 69,000 Mcf of gas to offset peak day

21. J.A. at 475.

22. J.A. at 477, 540-41, 546, 554 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

23. J.A. at 568-69, 572 (Testimony of A. M. Derriek of El Paso Natural Gas Co.).

curtailments of EOC residential-commercial service which were expected to reach 226,000 Mcf.[24]

In short, we think the Commission's prediction of severe EOC curtailments under the former plan is supported by substantial evidence. We note, however, that the testimony does not distinguish between commercial and residential service for purposes of estimating peak day demands. Exhibit 237 merely contains figures representing aggregate peak day curtailments of both commercial and residential EOC customers which could have been anticipated under the former plan.[25] There is no indication that residential customers would actually have been curtailed at all.[26] It is possible that the estimated 25% cutback of residential-commercial service would have been completely absorbed by the commercial sector. Consequently, there is no substantial evidence to sustain the finding that EOC residents would "probably" or "undoubtedly" have been curtailed under the old plan. On the other hand, the evidence does sustain the conclusion that peak day curtailment would, at minimum, cause the complete shut-down of EOC direct industrials and substantial reduction of service to EOC commercial customers while California service remained undisturbed. We think the latter findings form a sufficient basis for the Commission's actions to the extent we affirm them in this opinion. We recognize, of course, that the Commission might have followed a different course of action

24. Exhibit 237, Schedule 1, pp. 1-14, 18, J.A. 651-65, 669.

25. Testimony indicates that separate estimates of residential and commercial needs on a peak day were not available to El Paso. J.A. at 545 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.).

26. El Paso's witness conceded that he could not predict residential curtailment on an *average* day, as opposed to a peak day. J.A. at 545.

had it not incorrectly concluded that EOC residential customers would "undoubtedly" be curtailed under El Paso's previous tariff provisions. Upon remand, the Commission is free to modify its orders accordingly, subject to further review by this court.

B. *Findings Regarding "Grouping"*

"Grouping", or "conjunctive billing" as it is sometimes called,[27] is a practice whereby a customer having more than one delivery point on a pipeline is permitted to take delivery of its gas entitlements at whichever delivery points and in whatever proportions it chooses. Because this practice was not mentioned in Opinion 634, El Paso requested clarification of the Commission's position with respect to grouping. The Commission responded in Opinion 634-A as follows:

> [W]e find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point.

J.A. 241. Southern Union Gas Co. ("Union") objects to this prohibition against grouping. Union is a gas distribution company with many relatively small distribution systems scattered along El Paso's Southern Division System. Each of Union's systems connects with the El Paso line but they are not otherwise interconnected. Prior to the

27. We note that these terms are not necessarily synonymous. *See* Decision of Administrative Law Judge on Grouping of Delivery Points, p. 1 (September 19, 1973). (This decision approves grouping for purposes of the permanent plan.)

Commission's prohibition against grouping, service curtailments to Union were computed on a systemwide basis. Thus, if a 30% curtailment of priority 5 gas were in effect on a given day, Union would be curtailed by a volume equal to 30% of the total of its priority 5 entitlements. The effect of Opinion 634-A is that curtailments to Union must now be computed separately for each delivery point. Mathematically, the result would appear to be the same, but as the testimony of Union's Vice-President points out, there is a significant difference:

> A. The best way to explain it probably would be to take the case of a delivery point from El Paso to Southern Union through which only one industrial customer is served. We have, in fact, several such situations. Let's assume this is a Priority 4 customer with a daily requirement of 1,000 Mcf, and that during a particular 10-day period El Paso is curtailing its Priority 4 deliveries an average of 30 percent each day. In that situation, as El Paso is interpreting Opinion No. 634-A, Southern Union cannot receive for redelivery to this customer more than 700 Mcf on any one day. And right there is where we run into trouble, because many of our industrial customers cannot, as a practical matter, continue operating their facilities if their gas supply is subject to any significant curtailment. So far as gas usage is concerned, they are either completely on or completely off.

J.A. 582-83 (Testimony of Oran L. Haseltine). The grouping method would permit Union to deliver gas to its on-or-off customers in such a way that none would be curtailed more than necessary and systemwide curtailment of Union would be on a level equal with other El Paso customers. Thus, if a 30% curtailment of priority 4 customers were in effect for a ten-day period:

> [W]e could provide the customer with his full requirements on seven days and cut him off completely for three. This, over the full 10-day period, would give him merely the same 7,000 Mcf in the aggregate which we have assumed to be his entitlement. Instead of effectively shutting him down for the entire 10 day period simply because he cannot operate on only 700 Mcf per day, we would have enabled him to continue operating 70 percent of the time
>
> . . . .
>
> By staggering the days of cut-off among them, we obviously should be able to put all of them on the same sort of three-days-off, seven-days-on schedule I've been talking about, and still overall not be delivering more gas to them on any day than the aggregate of its individual allotments of gas for that purpose; none of El Paso's other customers would suffer any resultant decrease in service.

Id. at 586-87. We are not called upon here to judge the merits of the grouping technique. The testimony set out above is cited only for the purpose of explanation. The question before us now is whether the Commission acted arbitrarily in prohibiting this practice. Union argues that there is no evidence of record to support the Commission's finding that grouping of delivery points "could result in discrimination against those customers, including California, who have only one delivery point." The Commission's brief fails to point out any such evidence and, at oral argument, counsel conceded that there was none:

> QUESTION: Well, couldn't we find that there was no substantial evidence supporting the grouping decision and just excise that out of the order?

MR. McHENRY: Your Honor, there is no substantial evidence supporting the position taken by Southern Union on this record that it should necessarily have grouping. This was just—

QUESTION: Is there any evidence to the contrary?

MR. McHENRY: I don't believe there is evidence to the contrary, either way or the other, on this record, your Honor.

Tr. at 44. The Commission suggests that its action was justified because Union failed to raise the issue at hearings on the interim plan. It is clear, however, that the burden is upon the Commission to show that substantial evidence sustains its finding that grouping of delivery points would be discriminatory. There is no indication that the question was ever considered until El Paso requested clarification of the Commission's original order, Opinion No. 634. Indeed, testimony before the Commission strongly suggests that it was understood by all parties that grouping would be permitted.[28] We conclude, therefore, that the Commission's findings with respect to grouping are not supported by substantial evidence. The Commission's Opinion No. 634-A must be reversed to the extent that it prohibits grouping of delivery points by El Paso's customers, and remanded for further fact findings.

V. The Commission's Conclusions of Law

At this point it may be helpful, for purposes of our analysis, to restate the source of the Commission's author-

28. J.A. at 550 (Testimony of M. K. O'Toole of El Paso Natural Gas Co.), 576 (Testimony of James M. Kiely, Jr. of the FPC staff).

ity to prescribe an interim curtailment plan:

> Whenever the Commission . . . shall find that any rate, charge or classification . . . or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

Natural Gas Act, section 5(a). The Commission's exercise of its authority under this statute is a two-step adjudicatory process: first, the Commission must find that an existing condition is unjust or discriminatory; second, the Commission must prescribe the remedy for that condition. Each step requires the Commission to draw a legal conclusion, *viz.*: the illegality of an existing condition and the justness and reasonableness of the remedy. In the present case, the Commission has found that El Paso's former curtailment procedures are "discriminatory under sections 4 and 5 of the Natural Gas Act" and that the temporary curtailment plan promulgated in Opinion 634 is "reasonable, necessary, appropriate and in the public interest." Our reviewing function with respect to such conclusions of law is somewhat different from that applied to the Commission's findings of fact. This difference was pointed out in the concurring opinion of Chief Judge Stephens in *Capital Transit Co. v. Public Utilities Commission*, 213 F.2d 176, 187 (D.C. Cir.), *cert. denied*, 348 U.S. 816 (1954):

> The decisions require a commission in a quasi-judicial proceeding to make basic findings supported by evidence and ultimate findings which flow rationally from the basic findings—this in order that the commission

> shall itself perform the initial function of evaluating the evidence and deciding the issues of fact, and in order that the courts, as reviewing tribunals, can decide whether or not the ultimate decision reached by the commission follows as a matter of law from the facts found as its basis, and also whether or not the facts found have substantial support in the evidence.

See also Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938); *In re United Corp.*, 249 F.2d 168, 179-80 (3rd Cir. 1957); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The Commission's action must be sustained if it is reasonable in light of the basic fact-findings and the record evidence. In the matter now before us, a number of the parties challenge the reasonableness of the Commission's action. This part of the opinion will consider those objections.

A. *"Pre-existing Curtailment"*

Petitioners Southern California Edison Co. and the Department of Water and Power of the City of Los Angeles (hereafter referred to collectively as "Edison") argue that the Commission's action is unreasonable in light of the gas supply shortages being experienced in the California market.[29] The Southern California Gas Company (SoCal) and the San Diego Gas and Electric Company (San Diego) also complain that the Commission has ignored the shortages in California. The position of SoCal and San Diego

29. For purposes of clarity, we do not follow Edison's practice of referring to these shortages as "pre-existing curtailment." In fact, there had never been any curtailment of El Paso's service to its California customers prior to adoption of the interim plan. J.A. at 340, 344, 353 (Testimony of Mr. Travis Petty of El Paso Natural Gas Co.).

is that the Commission should have taken the alleged California shortages into account in formulating the interim plan. Edison, on the other hand, argues that, had the Commission considered these shortages, the former plan would not have been found to be discriminatory.

Edison's argument must fail. The Commission properly found, based upon substantial record evidence, that the former curtailment plan would have required complete cutoff of EOC customers prior to any curtailment by El Paso of its service to California customers.[30] Based upon this finding it was reasonable for the Commission to conclude that the former tariff provisions governing curtailment were discriminatory, regardless of the shortages which plague California.

SoCal and San Diego raise a more difficult question, namely: was it reasonable for the Commission to issue an interim curtailment plan which fails to take into account pre-existing gas shortages in California? In our opinion the answer is yes. Admittedly, the Commission's opinions are devoid of any mention of recent supply shortages in California, although the record contains testimony on the matter.[31] The opinions call for ratable curtailment of all customers without any adjustments which might lighten the burden of curtailment for customers already experiencing shortages. These facts strongly suggest that the Commission ignored the California supply problem when it formulated the interim plan. If the Commission had promulgated a *permanent* curtailment plan under these circumstances, failure to consider the pre-existing shortages in California and to enunciate findings with respect

30. See the discussion at part IV A, *supra*.

31. J.A. at 529-31 (Testimony of John C. Abram of Southern California Gas Co.).

to that situation would almost certainly have been fatal. The orders under review are *interim* orders, however. On review, the court must take into account the temporary nature of the Commission's action as well as the exigencies which prompted the Commission to grant interim relief. An interim order is not arbitrary simply because it fails to resolve all issues raised in the proceeding.

In the present case, we think the Commission's action was reasonable. Once having determined that the existing curtailment procedures were discriminatory, the Commission was faced with the choice of allowing them to remain in effect pending issuance of a permanent order, or instituting a temporary plan which would cure at least the more severe defects of the illegal plan. The main purpose of the interim plan was to avert the danger that EOC residential users might be curtailed during the winter of 1972-73. The pre-existing shortages in California add complex problems, the resolution of which the Commission properly deferred until the issuance of a final order.

Our approval of the Commission's action is obviously based upon the assumption that it has merely deferred consideration of California market conditions and that this factor will be taken into account in the formulation of the permanent plan. Ideally, such an intention should be expressed in the agency's interim order, so that the reviewing court is not left to guess at its reasoning. Upon remand, therefore, we invite the Commission to incorporate into its interim order a full statement of its reasons for postponing the resolution of issues arising from the California gas shortage.

B. *Withdrawals From Storage*

In computing the curtailment to be apportioned to each of its customers on a particular day, El Paso is required

to use a formula set forth in section 11.3(b)(i) of its revised tariff, which we paraphrase as follows:

$$\frac{\text{Customer's Needs}}{\text{Systemwide Needs}} = \frac{\text{Customer's Share}}{\text{Available Supply}}$$

J.A. at 347 (Testimony of M.A. Erlich). Because California customers rely on El Paso for only part of their gas supply, only part of their needs are counted for purposes of this formula. The proper proportion is determined by the ratio of scheduled deliveries from El Paso to total scheduled deliveries from all sources. If, for example, only one-half of the California customer's supply for the day is scheduled to be provided by El Paso, then only one-half that customer's requirements are counted for purposes of computing its share of the shortened El Paso supply. The basic formula set out above quickly discloses the effect of such a reduction of the "needs" figure: it reduces the customer's share of the El Paso supply.

The California customers do not challenge the basic fairness of this scheme, but they strongly object to the treatment of stored gas as an independent source of supply, because at least some of the gas withdrawn from storage on a particular day will be traceable to previous purchases from El Paso. Treating this gas as an independent supply, it is argued, results in an underestimation of El Paso's share of the total California market. This in turn causes excessive curtailment of California customers by El Paso. Apparently recognizing this problem, the Commission staff recommended an adjustment to the curtailment formula.[32] The Commission declined to include the adjustment in the interim plan, however, stat-

32. J.A. at 483 (Testimony of James M. Kiely, Jr. of the FPC staff).

ing that it would add an "additional complication."[33] We do not think this brief and conclusory statement is sufficient to sustain the Commission's rejection of the staff proposal. As we stated in our discussion of "pre-existing curtailment," *supra,* problems which greatly complicate the Commission's work may properly be deferred if prompt interim action is necessary. In this instance, however, the staff had apparently been able to devise a solution for use under the interim plan. There is no suggestion that the proposed storage adjustment formula would impede implementation of the interim plan. The mere fact that the solution is complicated cannot justify the Commission in refusing to provide just and reasonable interim curtailment procedures. We therefore remand this matter to the Commission for further consideration of the proposed storage adjustment formula.

One further question was raised in the briefs concerning the Commission's treatment of withdrawals from storage. SoCal takes the position that no part of such withdrawals should be counted as a source of supply for purposes of curtailment. To do otherwise, it is argued, will discourage the development of gas storage facilities. This prediction is convincingly disputed by testimony in the record.[34] Even if SoCal is correct, however, an otherwise just and reasonable determination of the storage issue is not invalid merely because it might be a disincentive to the storage of gas. The development of storage facilities is an ancillary policy consideration committed to the discretion of the Commission. The failure of a particular proposal to conform in all respects to established policies

33. Opinion 634, ¶ 12, J.A. at 141.

34. J.A. at 346-49 (Testimony of M. A. Erlich of El Paso Natural Gas Co.).

of natural gas regulation does not necessarily preclude Commission approval of the proposal.[35]

C. *Shift of Industrial Gas*

Perhaps the most strenuous objections of the California customers to the temporary plan are directed toward its effect on the allocation of gas for industrial uses. As explained above, the old curtailment plan placed every EOC customer in a priority subordinate to all California customers. In the event of a gas shortage, the California customers would have been the last to suffer any curtailment. Since the temporary plan is based upon categories of end use, however, the California customers must now share ratably any curtailment which becomes necessary. As a result, EOC industrial users will suffer less immediate curtailment than under the old plan and the California industrial users will suffer more. This effect is referred to by the California customers as a "shift" of industrial gas from California to EOC users. They complain that this measure is not warranted by the "emergency" and not necessary for the protection of EOC human needs customers.[36] This contention plainly misapprehends the basis and scope of the Commission's action.

In Opinion 634 the Commission clearly found that the former curtailment plan was discriminatory *in toto,* not

35. For similar reasons, we do not think arguments addressed to the economic impact of the interim plan (SoCal Br. at 20; PG&E Br. at 17; San Diego Br. at 31), its effect on the development of alternate fuel facilities (PG&E Br. at 21) and the availability of "less disruptive" plans (SoCal Br. at 24) require reversal of the Commission's interim order. Of course any of these factors may take on greater significance for purposes of a permanent curtailment plan.

36. Tr. at 24; SoCal Br. at 13; PG&E Br. at 13 *et seq.;* Edison Br. at 20-22; San Diego Br. at 7-8, 20-23.

just in its effect upon EOC human needs customers:

> Under [the former] tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present circumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso, is discriminatory and violative of Section 4(b) of the Natural Gas Act.

J.A. at 136-37. Concededly, the Commission placed great emphasis upon the most eggregious faults of the former plan, i.e. its effect upon EOC residential and small commercial customers. But the key findings of the Commission refer to EOC customers generally: the former curtailment plan "would patently discriminate against the EOC customers" because ". . . no curtailment would take place to California customers until all EOC service had been curtailed." Since we have already concluded that these findings are sustained by substantial evidence (part

IV A), the only remaining question is whether the temporary plan is arbitrary in its treatment of industrial users in California. We think not. The ratable curtailment of industrial users in order to protect supplies to Priority 1 and Priority 2 customers is a reasonable interim course of action in light of the Commission's findings. Although it might not be the sole solution or the best solution, it is certainly within the range of conclusions which might be reached by reasoned decision making. A separate question arises regarding the Commission's disparate treatment of boiler fuel users as opposed to other industrial customers. This is treated in the following section.

D. *Boiler Fuel Uses*

Under the Commission's interim curtailment plan, the lowest two priorities (Priority 4 and Priority 5) are assigned to customers who use natural gas as boiler fuel when alternate fuel facilities are present. (The only difference between Priority 4 and Priority 5 is the daily volume involved.) Such customers will be the first to experience curtailment in the event of a gas shortage and service to them will be completely terminated before any curtailment of service to higher priority customers, including industrial customers applying gas to uses other than as fuel for boilers. Several of the parties argue that this treatment of boiler fuel uses is unreasonable[37] and not supported by substantial evidence.[38] It is also contended that the Commission failed to articulate its reasons for assigning the lowest priority to boiler fuel uses.[39] We think the last contention is dispositive.

37. PG&E Br. at 20-22; Brief of Intervenor State of California at 7-8.

38. Edison Br. at 33-35; Willcox Br. at 5-6.

39. PG&E Reply Brief at 10; Willcox Br. at 55.

A search of the two opinions under review reveals no specific findings or reasoning in support of the Commission's decision to assign boiler fuel uses of gas to the lowest priority. As we have stated many times in the past, the failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). Upon remand of this proceeding, the Commission is directed to make findings concerning the curtailment priority appropriate for boiler uses and to state the reasons for its determination.

The Government suggests that it was not necessary for the Commission to state its reasoning in this matter because the determination is supported by established Commission policy and precedent. We requested supplemental briefing on this point by our Order of October 31, 1973, which posed the following question:

> Is there established Commission policy and precedent which will sustain the Commission's further finding (2) of Opinion No. 634 subordinating certain boiler fuel uses to all other uses?

We conclude that this question must be answered in the negative.

While it is true that the Commission has for a long time considered the use of natural gas as boiler fuel to be "inferior" to other uses,[40] it is clear from the decisions of the Commission that this policy has never been conclusive. Rather it is but one factor to be considered in making a regulatory decision affecting boiler fuel use. The Commission itself recently recited a litany of cases in which the

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40. *See, e.g.*, Federal Power Commission Annual Report (1940) at p. 79.

use of natural gas as boiler fuel had been approved:

> Commission policy in the past has not been to deny boiler fuel sales, but to authorize them where they served some public advantage. *Texas Gas Transmission Corp.*, 12 FPC 658 (1953); *Transcontinental Gas Pipe Line Corp.*, 11 FPC 615 (1952); *Northern Natural Gas Company* (Black Dog), 29 FPC 1025 (1963); *Michigan Wisconsin Pipe Line Company*, 32 FPC 737 (1964). In the *Transcontinental* case the Commission authorized the sale of interruptible gas to Duke Power Company for boiler fuel where it was shown that Transco would obtain additional revenues without substantial operating cost. In the *Northern Natural* case the Commission approved a sale of natural gas for resale for boiler fuel where the sale was contemplated in a settlement of Northern's rates and was therefore beneficial to Northern's customers. In the *Michigan Wisconsin* case the Commission authorized the direct sale of gas to a power company for boiler fuel use where there would be a fuel saving to the power company and a resulting rate reduction by Michigan Wisconsin.
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> . . . .
>
> In our opinion, while we have termed boiler fuel use inferior in the past, at present it cannot necessarily be so termed because of the air pollution problem. In *Transcontinental Gas Pipe Line Corp.*, 38 FPC 906 (1967), the Commission approved delivery of additional firm gas to Con Ed for boiler fuel use noting among other things that is [*sic*] would be an affirmative step in dealing with the air pollution problem.

Chandeleur Pipe Line Co., 44 FPC 1747, 1756 (1970). A subsequent opinion in the same case stated that "there is no superior or inferior use of natural gas *per se*; it depends upon the circumstances." *Chandeleur Pipe Line Co.*, 45 FPC 370, 371 (1971). Thus, the Commission's policy disfavoring the use of natural gas as boiler fuel can be outweighed by other considerations arising in a particular case. Our duty in this case is not to weigh the anti-boiler fuel policy against other factors, but to point out that such a balancing process must take place. The Commission's own recent statement of policy regarding curtailment priorities acknowledges as much:

> When applied in specific cases, opportunity will be afforded interested parties to challenge or support this policy through factual or legal presentation as may be appropriate in the circumstances presented.

FPC Order No. 467 at 1 (January 8, 1973).[41] The opinions now under review give no indication whether such an opportunity was provided or such a weighing of interests was conducted. In asking us to sustain its decision, the Commission is really asking us to hold that boiler fuel uses of natural gas are *per se* inferior to all other uses, for purposes of curtailment, regardless of the particular circumstances. As we said in *Public Service Commission of the State of New York v. FPC*, 463 F.2d 824, 826 (D.C. Cir. 1972), we are not prepared to so hold, and will not do so in the absence of a proper and definitive determination by the Commission that such is the case.

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41. This order was modified by orders 467-A (January 15, 1973) and 467-B (March 2, 1973). The latter order contains the following statement: ". . . Order No. 467 is a policy statement and is not intended to initiate a proceeding or to provide a binding rule without further proceedings directed towards curtailment problems on specific pipelines."

E. *Volumetric Limits*

Following the issuance of Opinion 634, El Paso filed tariff revisions intended to implement the Commission's order. Section 11(j) of the revised tariff, which was approved by Opinion 634-A, establishes limits upon the amounts of gas El Paso's customers will be entitled to purchase while the interim order is in effect. There is both a daily limitation and a periodic limitation, i.e. a limit on the total amount of gas which may be purchased while the interim plan is in effect. For convenience, we shall refer to this latter limit as the annual limit. The daily limit is set at the maximum daily delivery obligation of El Paso under its contract with each customer. The annual limit is computed in either of two ways: (1) the limit for a customer who purchases his entire gas supply from El Paso (a "full requirements" customer) is the quantity actually received by that customer between July 1, 1971 and June 30, 1972 (plus any curtailment experienced during that period); (2) the limit for a customer who purchases only part of his gas supply from El Paso (a "partial requirements" customer) is a quantity equal to his maximum daily contract entitlement multiplied by the number of days in the year. Since the EOC customers are full requirements customers, the annual limit on their gas entitlements is measured under the first rule. The maximum annual entitlements of the two California customers (PG&E and SoCal) are measured under the second rule, however, because they are partial requirements customers.

Petitioner American Smelting and Refining Co. (Asarco) contends that the effect of this dual standard is that the California customers will be permitted to purchase volumes of gas in excess of the amounts delivered

to them in the past whereas Asarco and other EOC customers are limited to their historic takes.[42] In Asarco's view, such divergent treatment of these two classes of customers is discriminatory. The Commission, which devotes only a single footnote in its brief to the question, states simply that "[t]his treatment was reasonable and certainly within the Commission's discretion."[43]

We are unable to decide whether the Commission's action was reasonable or discriminatory because the Commission has not stated its reasons for adopting this dual annual limitation formula. The Commission's original order (Opinion 634) did not discuss or prescribe annual limitations. Opinion 634-A, which approved the El Paso tariff revision incorporating the formula, does no more than state that the annual limitations are consistent with those proposed by the Commission staff at the hearing.[44] In a subsequent order clarifying Opinion 634-A, the Commission shed little additional light upon the reason for its decision:

> East of California (EOC) customers are limited to annual takes during the twelve-month period ending June 30, 1972. This was provided for inasmuch as the existing contracts for EOC customers do not provide for annual limitations.

Order of February 7, 1973, J.A. at 334. While this does explain the need for a tariff provision restricting annual consumption by EOC customers, it does not explain why

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42. Although this result is not readily apparent, recent modifications of SoCal's contract with El Paso together with past transfers of gas between PG&E and SoCal make it possible. Asarco Br. at 41-43. The Commission apparently admits this in its brief at 52 n.54.

43. *Id.*

44. J.A. at 242.

these customers should be restricted on a different basis than the California customers. We must therefore remand this matter in order to provide the Commission with an opportunity to make further findings and to state the reasons for its decision or any modification of that decision which may appear to be necessary.

F. *Penalties*

Asarco also objects to the Commission's deletion of overrun penalties from the revised tariff filed by El Paso in response to Opinion 634.[45] These penalties are apparently intended to discourage El Paso's customers from taking amounts of gas in excess of their maximum daily allotment under the interim plan. In Opinion 634-A, the Commission removed the penalty provisions, stating:

> With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provisions for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

J.A. at 242. The Commission's concern for human needs customers is clearly unnecessary. The stricken penalty provision carefully defined the term "unauthorized overruns" to exclude overruns taken for the purpose of ful-

45. *See* § 20 of the Revised Tariff, J.A. at 233-34.

filling residential and small commercial requirements.[46] Consequently, the Commission's action cannot be sustained upon the stated reasoning.

We note that the passage quoted above makes vague reference to El Paso's past practices regarding penalties and to the "inappropriateness" of instituting such penalties in an interim plan. It is possible that these references were intended to state additional reasons for rejection of the penalty provisions. If so, we are of the opinion that such grounds are not sufficiently articulated so as to permit meaningful review here. This matter is remanded to the Commission, therefore, for further clarification of its reasons for deleting the penalty provisions of the El Paso tariff.

VI. Environmental Impact

The National Environmental Policy Act (NEPA) requires that, "to the fullest extent possible," each federal agency shall issue a statement detailing the environmental impact of any major action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1970). Several parties in the present case take the position that the establishment of an interim curtailment plan is a major federal action requiring such an environmental impact statement. They charge that the Commission's failure to issue such a statement violates the statute. The Commission does not deny that Opinions 634 and 634-A constitute major federal actions, but contends that compliance with the Act was not "possible" within the meaning of the statutory phrase "to the fullest extent possible." The Commission acknowledges its duty to give a full accounting of the environmental impact upon issu-

46. *Id.* § 20.2.

ance of its final permanent order. Its only contention here is that the same exigencies which prompted the issuance of an interim emergency curtailment plan prohibited full exploration of environmental problems prior to implementation of that plan.

This very question has been raised and decided in a similar case in the Fifth Circuit. In *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142, 150 (5th Cir. 1973), the duties of the Commission under the Natural Gas Act were held to supercede the procedural dictates of NEPA:

> The mandate of the NEPA on federal agencies is that they comply with the procedural duties imposed by the Act to the fullest extent possible. See Calvert Cliff's Coord. Com. v. United States Atomic Energy Com'n, D.C. Cir. 1971, 146 U.S.App.D.C. 33, 449 F.2d 1109, 1114-1115. As there noted, the legislative history of the NEPA interprets "to the fullest extent possible" to mean compliance unless compliance would give rise to a violation of statutory obligations. As *Louisiana Power & Light Co.*, supra, makes clear, the Federal Power Commission has a statutory duty to the public under the Natural Gas Act to take effective interim curtailment action in the exigencies presented by gas shortages. We cannot say that the NEPA suspends this duty of the Commission.

We think this reasoning is correct and dispositive. In the present case, the Commission's duty under the Natural Gas Act to prevent discriminatory practices in times of gas shortage called for prompt action. This created the type of "statutory conflict" which alone can excuse compliance with section 4332(2) (c). *Calvert Cliffs' Coordinating Committee v. A.E.C.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

Edison and SoCal attempt to distinguish *Atlanta Gas* on the ground that the time constraints at work in that case are absent here. Both parties note that in *Atlanta Gas* a revised tariff was filed in November 1971 indicating that immediate curtailment was required for the 1971-72 winter heating season. By contrast, El Paso's initial filing preceeded issuance of the interim plan by some sixteen months, ample time for preparation of an environmental impact statement. This distinction is misleading. El Paso's original filing (July 6, 1971), which is still pending before the Commission, did not request interim action by the Commission. Rather, it contemplated the approval of a final permanent curtailment plan after full hearings. It was not until August of 1972 that El Paso requested an interim order regulating curtailments for the 1972-73 heating season, by then only a few months away.

Our discussion of this issue would not be complete without the following caveat. A federal agency which seeks to excuse itself from its duties under section 4332 (2)(C) cannot do so by simply ignoring that statute. Rather, it must make express findings which demonstrate the "statutory conflict" which prohibits compliance. *Cf. Calvert Cliffs' Coordinating Committee v. AEC, supra,* 449 F.2d at 1115; *Scientists' Institute for Public Information, Inc. v. AEC,* 481 F.2d 1079, 1094 (D.C. Cir. 1973). Opinion 634, standing alone, does not meet this requirement. We think this defect is cured, however, by paragraph 10 of the clarifying opinion, No. 634-A.[47]

47. We note that over a year has passed since the implementation of the interim plan and that the plan has been extended indefinitely by the Commission's order of October 18, 1973. To the best of our knowledge, no environmental impact statement has yet been filed. It should be understood, however, that our ruling today is not a license for permanent or prolonged evasion of responsibilities under NEPA. If it becomes clear that the Commission's non-

VII. Summary

We hold that the Commission has authority under section 5(a) of the Natural Gas Act to establish, by interim order, a temporary curtailment plan based upon end use. This authority is not restricted by contractual arrangements among pipeline companies and their customers. The Commission's finding that the former curtailment plan was discriminatory and its determination to postpone consideration of preexisting gas shortages in the California market and to subordinate industrial uses of gas to residential and commercial uses are affirmed. Its determinations with regard to grouping, storage withdrawals, boiler fuel uses, annual volumetric limits and penalties for overruns are reversed for the reasons stated in this opinion. We further hold that the Commission's failure to issue an environmental impact statement at the time the interim plan was established did not violate NEPA, 42 U.S.C. § 4332(2)(C). This matter is remanded to the Commission for further proceedings consistent with this opinion. In order to insure orderly administration of gas curtailments, the Commission may continue the interim order in effect for a reasonable period of time pending its decision regarding the matters remanded for further consideration.

So ordered.

Fahy, *Senior Circuit Judge:* I concur except with respect to the scope of the remand. Upon my study of the record I conclude that the court should not disturb the Commission's interim plan regarding those parts

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compliance is attributable to motives other than statutory impossibility, interested parties will not be barred by this opinion from seeking appropriate relief.

thereof designated as follows in the court's opinion: (B) Withdrawals from Storage, (E) Volumetric Limits, and (F) Penalties. I would not require further consideration of these three subjects. In all other respects I concur in Judge Tamm's opinion for the court.

Appendix B

United States Court of Appeals

For the District of Columbia Circuit

September Term, 1973

No. 73-1016

San Diego Gas and Electric Company, Petitioner

v.

Federal Power Commission, Respondent

Johns-Manville Products Corp.
General Motors Corp.
Tucson Gas & Electric Co.
Shell Oil Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California
and the Public Utilities Commission
of the State of California
Intervenors

No. 73-1040

Pacific Gas and Electric Company, Petitioner

v.

Federal Power Commission, Respondent

General Motors Corp.
Johns-Manville Products Corp.
Tucson Gas & Electric Co.
Shell Oil Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California
and the Public Utilities Commission
of the State of California
San Diego Gas & Electric Co.

Intervenors

United States Court of Appeals

For the District of Columbia Circuit

September Term, 1973

No. 73-1042

Southern California Gas Company, Petitioner

v.

Federal Power Commission, Respondent

General Motors Corp.
Johns-Manville Products Corp.
Tucson Gas & Electric Co.
Southern Union Gas Co.
Southwest Gas Corp.
Salt River Project Agricultural
Improvement and Power District
Shell Oil Co.
El Paso Natural Gas Co.
Arizona Public Service Co.
Southern California Edison Co.
People of the State of California
and the Public Utilities Commission
and the State of California
San Diego Gas & Electric Co.
American Smelting & Refining Co., et al.,

Intervenor

United States Court of Appeals

For the District of Columbia Circuit

September Term, 1973

No. 73-1116

City of Willcox and Arizona
Electric Power Cooperative, Inc., Petitioners

v.

Federal Power Commission, Respondent

American Smelting & Refining Co., et al.
Johns-Manville Corp.
General Motors Corp.
El Paso Natural Gas Co.
San Diego Gas & Electric Co.
Southern Union Gas Co.
Intervenors

Before: Fahy, Senior Circuit Judge; and Tamm and MacKinnon, Circuit Judges

[February 25, 1974]

ORDER

On consideration of: the petition for rehearing filed by San Diego Gas and Electric Company for rehearing; the petition for rehearing filed by Pacific Gas and Electric Company; the petition for rehearing filed by Southern California Gas Company; and the petition of City of Will-

cox and Arizona Electric Power Cooperative, Inc., for rehearing, it is

ORDERED by the Court that each of the aforesaid petitions is denied.

Per Curiam
For the Court:

Hugh E. Kline
Clerk

Appendix C

FEDERAL POWER COMMISSION

OPINION NO. 634
(48 FPC 951 (1972))

EL PASO NATURAL GAS COMPANY, DOCKET NO. RP72-6

Opinion and Order Prescribing Interim Emergency Curtailment Plan

(Issued October 31, 1972)*

C. Frank Reifsnyder, G. Scott Cuming, Walter G. Henderson and *Donald Snow* for El Paso Natural Gas Company

William R. Duff and *Henry E. Brown* for El Paso Electric Company; Magma Copper Company; Phelps Dodge Corporation; Salt River Project Agricultural Improvement and Power District

William J. Derrick for El Paso Electric Company

John F. Mills for Magma Copper Company

Leroy Michael, Jr. and *Richard H. Silverman* for Salt River Project

Earl H. Carroll for Phelps Dodge Corporation

John T. Ketcham, Charles E. McGee and *Robert G. Haggerty* for Southern Union Gas Company and Pioneer Natural Gas Company

James R. Wetherbee and *A. S. Grenier* for Southern Union Gas Company

Jerry Hopson for Pioneer Natural Gas Company

Israel Butler, Thomas D. Clarke, K. R. Edsall and *Norman J. Provost* for Southern California Gas Company

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*Clarified, etc. by Opinion No. 634—A and order issued December 15, 1972, 48 FPC 1369. Stay denied by order issued February 7, 1973; see also order on protests, etc., issued February 7, 1973, 49 FPC 354, 355.

Robert W. Tollen, Sherman Chickering, C. Hayden Ames and *Donald J. Richardson* for San Diego Gas and Electric Company

David D. Mix, John D. Maharg and *John W. Whitsett* for Air Pollution Control District of the County of Los Angeles, California

Walter F. Wolf, Jr. for The Navajo Tribal Utility Authority

Rufus G. Thayer, Jr., Lawrence O. Garcia and *Mary Moran Pajalich* for The People of the State of California and The Public Utilities Commission of the State of California

Mrs. Lilyan Goode Sibert and *Renn C. Fowler* for General Services Administration

Frederick G. Von Huben for Community Public Service Company

William S. Martin, Jr. for The City of Lordsburg, New Mexico

Henry F. Lippitt, II for The Nevada Industrial Customers

Reuben Goldberg and *Leo J. Steffan, Jr.* for Nevada Power Company

Darrell Clark, Charles H. McCrea and *Lawrence V. Robertson, Jr.* for Southwest Gas Corporation

H. Robert Barnes, R. E. Woodbury, Robert J. Cahall, William E. Marx and *Alan Nedry* for Southern California Edison Company

John H. Engel for The Citizens Utilities Company

Arthur T. Devine, Roger Arnebergh and *Edward C. Farrell* for Department of Water & Power, City of Los Angeles, California

Richard M. Merriman, Peyton G. Bowman, III and *Brian J. McManus* for City of Mesa, Arizona and Arizona Public Service Company

Robert T. Hall and *N. H. Powell* for Arizona Public Service Company

J. LaMar Shelley for the City of Mesa, Arizona

Thomas F. Brosnan and *A. Y. Holeapple* for Tucson Gas and Electric Company

Jerome Ackerman and *James R. McCotter* for American Smelting and Refining Company, Compania Minera de Cananea, S.A., Inspiration Consolidated Copper Company and Kennecott Copper Corporation

Timothy M. Kelleher, Daniel E. Gibson, Frederick T. Searls and *Malcolm H. Furbush* for Pacific Gas and Electric Company

William G. Riddoch, Thomas G. Johnson and *Don A. Bruce* for Shell Oil Company

Heber P. Hardy for Public Service Commission of Nevada

George Mabry for Johns-Manville Corporation and seven Nevada Industrial Customers of Southwest Gas Corporation

Douglas W. Fraser for New Mexico Public Service Commission

Edward J. Grenier, Jr. and *Richard C. Noland* for Johns-Manville Products Corporation

Kermitt L. Waters for the City of Las Vegas, Nevada

Platt Davis and *Jane Nix* for the Staff of the Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

WALKER, *Commissioner:*

This proceeding arises from a filing on July 6, 1971, by El Paso Natural Gas Company (El Paso) wherein El Paso proposed revised tariff sheets that would allocate its firm reliable main line capacity of its Southern Division System and provide new priorities of service to be used in the event that a gas supply shortage required curtailment of deliveries below that capacity. We suspended this filing for the full five month period and set the case for hearing. Hearings on

the merits of this proposed permanent curtailment program have been held and that phase of this case is now pending before Presiding Administrative Law Judge Fribourg for his initial decision.

On August 17, 1972, El Paso filed a motion for the issuance of a Commission order prescribing interim emergency service rules and regulations to cover the curtailment of deliveries of natural gas on its Southern Division System for a period from November 1, 1972, until a final order is issued on its permanent curtailment plan. On August 24, 1972, Salt River Project Agricultural Improvement and Power District (Salt River) filed a motion to reopen the proceeding in this docket for the purpose of allowing evidence concerning El Paso's gas supply. By order of September 1, 1972, 48 FPC 428, we ordered that the record should be reopened for the limited purpose of taking evidence on the need for interim curtailment provisions and on the form such provisions should take. Hearings were held on these issues between September 12, 1972, and September 25, 1972. By our order of September 7, 1972, we also ordered that consideration be given to the claim of the City of Wilcox, Arizona (Wilcox) and Arizona Electric Power Cooperative (AEPCO) for extraordinary interim relief from the operation of any curtailment plan put into effect by El Paso. Because of the urgent nature of this proceeding on October 2, 1972, we granted a motion by El Paso for an order directing the Presiding Administrative Law Judge to certify the record on the interim curtailment procedures directly to the Commission for our decision. Briefs and reply briefs were filed on October 3, 1972, and October 10, 1972, respectively and the entire record and the briefs are now before us for decision.

Essentially the main issues now before us are whether we have authority to issue an interim emergency service

rule, whether the facts indicate that such an emergency rule is necessary and if so which of the several plans proposed is most appropriate for the interim period.

Our authority to effectuate curtailment plans of interstate pipelines for deliveries to direct customers as well as sales for resale has been affirmed. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). As noted by the Supreme Court, the Commission has emergency authority to issue interim orders effecting a curtailment plan. *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. at 644, note 18. While that affirmance was based primarily upon a tariff filing under Section 4 of the Natural Gas Act, we are also operating pursuant to Sections 5 and 16 of the Act in this case. As found below, without an interim curtailment plan the interests of El Paso's customers would be adversely affected. The exigencies of the situation, *i.e.* gas shortage and equities of El Paso's customers in this proceeding require prompt Commission action and a refusal to act would result in "gaps for private interests to subvert the public welfare." *F.P.C. v. Louisiana Power & Light Co., supra; F.P.C. v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20, 28 (1961). We are also exercising the flexibility of authority delegated to us pursuant to Section 16 of the Act. *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); *Mobil Oil Corp. v. F.P.C.*, 469 F.2d 130 (CADC-1972). *Cf. F.C.C. v. Schreiber*, 381 U.S. 279, 288-91 (1965); *Mesa Petroleum Co. v. F.P.C.*, 441 F.2d 182, 187 (CA5-1971). Thus, the purposes for which the Natural Gas Act was established, *e.g.*, to provide adequate service to consumers at the lowest reasonable rate, Sections 5 and 16 of that Act and applicable judicial interpretations are the bases upon which we are acting to promulgate an interim curtailment rule for El Paso, pending adjudication of a final plan in the hearings below. Our adoption of the interim plan, while based

upon the record certified to us, is more in the form of an interim emergency "rule"; but this rule will have the same legal effect and force as an approved curtailment plan under Order No. 431, 45 FPC 570. See Opinion No. 606, 46 FPC 786, October 5, 1971, appeal docketed *sub nom. Mobil Gas Service Corp., et al. v. F.P.C.*, No. 71-1607, 5th Cir.

As interpreted by El Paso, its existing and currently effective tariff provision customers would be curtailed in time of shortage in the following order, (a) best efforts gas; (b) irrigation gas; (c) direct industrial gas; (d) industrial gas of distributors east of California (EOC); (e) commercial gas of distributors EOC; (f) residential gas for distributors EOC; (g) gas sales to California customers under Rate Schedule G. Under this tariff provision no curtailment would take place to California customers until all EOC service had been curtailed. This means that both residential and commercial customers east of California would be cut off before any service to California was cut off. Almost all of the parties concede that under the present circumstances this would patently discriminate against the EOC customers. The supply evidence introduced by El Paso at the reopened proceeding clearly indicated that there was a real probability that curtailments under its presently effective tariff would result in cutting off not only commercial customers east of California but residential customers also, while California probably would be curtailed not at all. It is obvious that we would be negligent in our duties if we allowed human needs customers on any portion of the system to be cut off while industrial customers were still receiving gas on another portion of the system. We find that the currently effective plan of El Paso is discriminatory and violative of Section 4(b) of the Natural Gas Act.

At the reopened proceedings, El Paso witnesses showed that the original supply estimates presented in the main

proceeding had not taken into account a reduction in casinghead gas volumes available to El Paso and also a decline in allowables, the watering out of wells, and difficulties with line pressures. The evidence clearly showed that on a peak day El Paso would undoubtedly have to curtail EOC customers to the point where residential service would be affected. In view of this, almost all of the parties to the proceeding agreed that some interim emergency plan should be put into effect and we certainly agree and so find.

At the hearing essentially four different interim curtailment plans were proposed by the various parties. These were proposed by El Paso, the Commission Staff, Johns-Manville Products Corporation (JM), and by Southern California Gas Company (SoCal) with the concurrence of the Pacific Gas and Electric Company (PG&E). Various other parties to the hearings suggested variations of one or the other of the above plans or certain adjustments to the existing tariff which they felt would suit the situation. However, the above four are the only complete plans presented which we consider to be ready for implementation at this time. A brief description of each plan follows.

Under El Paso's proposed interim plan, which apparently is similar to its proposed long range plan, there are essentially two main steps. First El Paso would allocate its existing reliable main line capacity among each of its customers. The second step involves establishing a system of priorities in the event that El Paso is unable to deliver volumes equal to its reliable main line capacity. The priority step of El Paso's plan would involve the establishment of four priorities as follows, (1) domestic and residential consumers, (2) commercial consumers, (3) industrial consumers and direct industrial customers, and (4) direct industrial consumers served under contracts between El

Paso and such direct industrial customers presently or hereafter in effect and providing for a priority subordinate to the three stated above. To accomplish the necessary changes in service the El Paso proposal would require each of its customers to execute a new service agreement effective for the interim period. EOC direct industrial customers wishing to remain in priority three would have to agree to pay 5¢/Mcf above the existing rate for the privilege of receiving gas on a firm basis. Gas not paid for in the above manner would be delivered under priority four.

The Commission Staff curtailment plan rather than using reliable main line capacity as the point of departure would rely on the delivery obligations in the existing contracts. Staff would also limit annual takes of EOC distributors and industrials to actual annual takes for the 12 months ended June 30, 1972, since the existing contracts do not provide for annual limitations. The priorities of service under the Staff plan would be based on end use as follows: (1) residential, small commercial (under 50 Mcf), and residential needs related to direct and indirect industrial sales; (2) large commercial and those volumes of industrial gas required for plant protection and feed stock or process gas; (3) all other industrial requirements. The Staff plan would also provide for emergency environmental considerations whereby customers could apply for emergency gas from El Paso based on certification by a local air pollution control agency that an emergency based on EPA guidelines existed.

JM proposed a curtailment plan which it believed would be least disruptive to ultimate gas consumers during the interim period while a permanent plan was worked out. JM would assign the lowest priority to gas used as boiler fuel and within the boiler fuel category boilers with existing alternate fuel capacity would be ranked from the largest

to the smallest to reflect their fuel efficiencies and curtailed from the largest to the smallest in that group. JM believes that such curtailment would take care of the immediate problem envisioned by El Paso and alternate fuel availability would be the real criteria for determining curtailments.

SoCal and PG&E believe that for this winter they can operate under El Paso's existing curtailment plan through the use of the storage capacity of SoCal and PG&E. Under this plan California distributors to the extent possible would allow El Paso to reduce deliveries to them during emergency periods and they would withdraw gas from their own storage to take up the difference. For this service, SoCal and PG&E would expect the gas to be redelivered within 6 months and also that El Paso would pay 30¢/Mcf for the gas taken from storage which purportedly represents the cost of one storage cycle.

We have carefully considered each of these plans and combinations thereof, keeping in mind that any plan ordered would be for the 1972-1973 winter only. We would emphasize that any plan ordered now is being adopted under the pressure of time and is not intended in any way to indicate the direction of the determination of a long range plan now pending before the Administrative Law Judge. Based upon a consideration of the record before us and the briefs and reply briefs filed by the various parties we find that the plan proposed by the Commission Staff would be the most equitable but also find that it should be modified to use a priority system less disruptive and more easily implemented. In so doing we are not requiring the installation of dual fuel capacity during the interim period. We do recognize that over the long term, the interim plan we have adopted may operate as a disincentive to the installation

of alternate fuel capacities. In addition, we believe that in calculating these priorities for this interim period the storage withdrawal adjustments proposed by Staff adds an additional complication which should be eliminated.

In rejecting the El Paso proposal as an interim plan we note first that the El Paso proposal would require customers to enter into entirely new contracts for the interim period. To the extent possible, we believe existing relationships should be preserved until the long range permanent plan is ready to go into effect. In addition, we believe that the Staff plan gives greater consideration to end use while preventing the abuse of the interim curtailment procedures by any of the customers who under El Paso's plan could attach new residential and commercial customers. The discrimination between priority 3 and priority 4 customers is obvious in the El Paso plan.

Although we are not adopting the plan proposed by JM, we believe that its concepts based on end use and a minimum of disruption during the interim period are steps in the right direction. We have, therefore, given consideration to this plan in formulating our own.

With regard to the plan proposed by SoCal and PG&E we find that it would just be too little and too late. It would leave the presently effective El Paso curtailment plan as the only valid tariff and we have already found that that contains inequities far beyond anything we can continue to permit. In addition, the SoCal, PG&E plan does not assure service to human needs customers but promises to do its best with what is available from storage. It would appear to be at best just a plan to assure California customers that they would be unaffected by any El Paso curtailments.

The necessary tariff provisions to carry out our determination made herein should be submitted by El Paso within

30 days and will be accepted subject to our approval as to form. These provisions will be in effect until October 31, 1973, or until a permanent plan is finally approved by this Commission, whichever is earlier. If curtailments are necessary prior to the filing of the interim provisions El Paso should curtail all industrials ratably.

The remaining question before us involves the claim of Wilcox and AEPCO for extraordinary relief and total exemption from any curtailment plan during the coming winter. AEPCO, supported by Wilcox, alleges that it is unable to purchase fuel oil sufficient to satisfy its projected electric generation requirements during the coming year if El Paso's curtailments are actually put into effect. Based on the record made by AEPCO, we cannot find that it is entitled to the relief which it claims.

The AEPCO evidence shows that it has current storage capacity of 2.8 million gallons of oil as an alternative fuel and that this storage is now filled. If maximum curtailments were to be in effect, this storage would fall far short of the necessary fuel needed by AEPCO. AEPCO claims that it has been unable to enter into a contract for the necessary additional fuel oil and that in any event the transportation of such fuel oil would be extremely difficult because of the location of AEPCO's plant. The record shows, however, that AEPCO refused to enter into a contract with one supplier for 4 million gallons because the supplier would make monthly deliveries rather than at AEPCO's option. In addition, AEPCO was more given to excuses for not negotiating for additional fuel rather than proving a failure of a bona fide effort. In this connection we note that many of the other customers of El Paso such as the copper companies showed that they had been able to find alternative fuel supplies for the coming winter and we cannot find that AEPCO has exhausted all of its possibilities. AEPCO is, of course,

free to renew its motion if at some later period it is able to make a more persuasive showing of an entitlement to the relief it seeks.

The Commission further finds:

(1) The currently effective curtailment provisions of El Paso's tariff are discriminatory under Sections 4 and 5 of the Natural Gas Act and it is appropriate that interim curtailment provisions be substituted pending a final determination of permanent just and reasonable tariff provisions.

(2) For the interim period ending October 31, 1973, or the date of final Commission order in these proceedings, whichever is first, we prescribe the following categories of curtailment priorities for El Paso's Southern Division, which are found to be reasonable, necessary, appropriate and in the public interest. The basic objectives of these categories are (1) to protect deliveries for residential and small volume commercial consumers who cannot be safely curtailed on a daily basis and (2) to require, as the initial level of curtailment, reduction in deliveries for large volume boiler fuel usage where alternate fuels are available:

Priority 1. Residential, small commercial (less than 50 Mcf on a peak day) and residential needs associated with industrial requirements served directly or indirectly.

Priority 2. Large commercial requirements and industrial requirements for plant protection, feedstock and process needs.

Priority 3. All industrial requirements not specified in Priorities 2, 4 and 5.

Priority 4. Industrial requirements for boiler fuel use at less than 3,000 Mcf per day, but more than 1,500 Mcf per day, where existing alternate fuel capability is present.

Priority 5. Industrial requirements for large volume (in excess of 3,000 Mcf per day, but more than 1,500 Mcf per day) where existing alternate fuel capability is present.

(3) Delivery reduction in each subordinate priority shall be complete before deliveries for requirements in a higher priority are curtailed.

(4) Industrial requirements of El Paso's direct and resale customers shall be curtailed ratably within each priority.

(5) Curtailment shall be implemented daily as required by operating conditions on the Southern Division.

(6) A daily limitation on sales shall be imposed consistent with the Maximum Daily Delivery Obligation as provided within the currently effective east-of-California contracts and service agreements. The California customers are adequately limited at present by the Maximum Daily Contracted Demand of the existing agreements.

(7) Determination of El Paso's share of the California market for purposes of this interim curtailment plan shall not include a component for storage gas attributable to any previous delivery by El Paso.

(8) Implementation of our plan will require certain market data which El Paso may not have in the required form. El Paso shall secure all data necessary to effectuate compliance herewith, and shall file interim tariff provisions consistent therewith, acceptable to the Commission, on or before November 30, 1972.

(9) In the event El Paso should need to curtail deliveries for any reason before November 30, 1972, it shall be required as part of the emergency procedure to implement ratable curtailment of the industrial component of its direct and resale markets, including El Paso's share of the California market, using the best available data as basis for determination of industrial requirements; and shall protect residential and small commercial consumers.

(10) The motion of Wilcox and AEPCO for extraordinary relief should be denied.

The Commission orders:

(A) El Paso shall file revised tariff sheets consistent with the above findings within 30 days which, subject to our approval shall become effective immediately upon filing.

(B) Such tariff sheets shall be effective until October 31, 1973, or until a permanent curtailment provision is approved, whichever is earlier.

(C) Prior to filing the revised sheets any necessary curtailments shall be carried out under finding number 9.

(D) The motion by Wilcox and AEPCO for extraordinary relief is denied.

(E) The record certified to us by the Presiding Administrative Law Judge is remanded for his consideration in determining a permanent curtailment plan.

Appendix D

FEDERAL POWER COMMISSION

OPINION No. 634-A
(48 FPC 1369 (1972))

EL PASO NATURAL GAS COMPANY, DOCKET No. RP72-6

Opinion and Order Clarifying Opinion, Denying Motions for Stay, and Denying Rehearing

(Issued December 15, 1972)*

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., Pinkney Walker and Rush Moody, Jr.

WALKER, *Commissioner:*

Since we issued our Opinion No. 634 on October 30, 1972, 48 FPC 931, prescribing interim curtailment plan for El Paso Natural Gas Company (El Paso) a number of the parties to the proceeding have made various filings requesting stays, clarification, modification and rehearing. Attached as Appendix A to this Opinion is a chronological list of the various filings we have received in connection with Opinion No. 634. On November 29, 1972 we issued an order staying the effective date of the filing to be made by El Paso on November 30, 1972 until such time as we could consider the many filings made by the parties. On November 30, 1972 El Paso filed the revised tariff sheets as required by Opinion No. 634 and we now have that tariff as well as the many filings before us.

Many of the filings contain arguments made to us prior to the issuance of Opinion No. 634 and in most cases we see

*Order issued February 7, 1973 denying motion for stay; see also Order on protests, motions for clarification and applications for rehearing issued February 7, 1973, 49 FPC 354, 355.

no reason to discuss these all over again. However, certain of the filings raise questions which we believe merit further discussion and in some cases clarification with regard to our meaning in Opinion No. 634.

In its motion of November 20, 1972 for partial stay or immediate clarification, El Paso contends that certain ambiguities are present in our Opinion which require clarification before the tariff sheets may be implemented. Four questionable areas were noted by El Paso as requiring immediate clarification in order to proceed with the curtailment plan as ordered. These areas concern primarily the lowest categories of service since this is the service that will be immediately affected by the curtailments.

The four areas of concern and El Paso's interpretation are as follows:

(a) *Alternate Fuel Capabilities:* El Paso believes that there may be some ambiguity in the use of the terms "alternate fuel capabilities" and "alternate fuel facilities." El Paso questions whether an industrial customer having alternate fuel facilities in existence should be regarded as having "existing alternate fuel capability." The revised tariff sheets will utilize the term "where existing alternate fuel facilities are present" in the definition of Priorities 4 and 5.

(b) *Boiler Fuel Use:* According to El Paso, several customers have raised the question as to whether or not the term "boiler fuel use" as it appears in the definition of Priorities 4 and 5 service included that used for gas-powered turbines utilized for electric generation and any other direct fired application wherein alternate fuel capabilities exist. The revised tariff sheets will indicate that Priorities 4 and 5 do *not* include the above uses within the definition of boiler fuel.

(c) *Requirement v Scheduled Deliveries:* El Paso questions the reference to the word "requirement" as meaning total "all out" requirement or scheduled use on a given day. In this regard El Paso has interpreted the Commission to mean those quantities which the customer would schedule for deliveries. Thus the revised tariff sheets will provide for "scheduled deliveries up to the Maximum Daily Delivery Obligation."

(d) *Grouping of Individual Delivery Point Delivery Obligation:* El Paso believes that a literal interpretation of the statement "Maximum Daily Delivery Obligation, as provided within the currently effective east-of-California contracts and service agreements" might preclude it from utilizing a customer's individual delivery point quantities at other delivery points where such quantities could best be utilized. However, the revised tariff will provide for such flexibility.

With respect to item (a), El Paso is correct in the use of the term "alternate fuel facilities." A review of the staff plan and testimony which was adopted by us indicates that El Paso's interpretation is consistent with the position and intent of staff in advocating its plan. We realize that there may be situations where alternate fuel facilities exist but for good reason the capability does not exist. As noted in other curtailment cases, any party who finds itself in a position such as this and can clearly show the Commission that such a situation exists is free to ask for extraordinary relief at any time.[1]

1. As a part of their petition of November 30, 1972, the City of Willcox, Arizona, and Arizona Electric Power Cooperative, Inc. have included an amended motion for extraordinary relief. This will be set for hearing by separate order.

With respect to item (b) (Boiler Fuel Use), we note that this pertains to the portion of the interim curtailment plan attributable to the proposals of the Johns-Manville witness and we realize there is no clear cut statement by either staff or the Johns-Manville witness as to the proper placement of gas turbine electric generation within the priorities of service as established by Opinion No. 634. While our basic intent in issuing Opinion No. 634 was to cause a minimum of disruption by curtailing large gas users with alternate facilities first, we are not ready to say at this time that gas powered turbines along with other direct fired applications should be considered boiler fuel for purposes of curtailment. Thus, we agree that El Paso has properly placed such uses in Priority 3. We would note, however, that this exclusion of these uses for Priorities 4 and 5 should not be used to divert boiler fuel to increased or new usage in turbines or direct fired applications during this interim period.

With regard to item (c), again we believe El Paso's interpretation is consistent with the staff position but it may also be that some further clarification is necessary since certain parties still seem to be confused as to its meaning. In providing that the basis for measuring curtailments will be the requirements up to the maximum of daily delivery obligation, it is our understanding and intent that this means whichever is the lesser. Thus the daily requirements will be used as a measure only if they are less than El Paso's maximum daily delivery obligation. In connection with this interpretation, we note that certain east-of-California parties who have not renegotiated their contracts with El Paso in recent years have been using substantial amounts of overrun gas to meet human needs requirements. This is made quite clear by the December 1,

1972 motion of the City of Mesa, Arizona for clarification or rehearing. Again we would note that where a party finds itself in a position such as that alleged by Mesa the door is open for a petition for extraordinary relief.

With regard to item (d), we find that the imposition of conjunctive billing as proposed by El Paso is not justified at this time, and could well result in increased industrial gas usage by those customers having a number of delivery points. Certainly it could result in discrimination against those customers, including California, who have only one delivery point. El Paso should eliminate this provision from the interim plan filed on November 30, 1972.

Two additional points raised by various parties which were not discussed in Opinion No. 634 involve annual limitations and overrun penalties. While we did not discuss or prescribe annual limitations in Opinion No. 634, we note that, consistent with the staff position at the hearing, El Paso has provided such limitations in its tariff filing based on the year ending July 1, 1972. Since this is consistent with the staff curtailment plan we expressly approve it. With regard to penalties for unauthorized overruns, we note that El Paso has never had them in its tariff and we do not consider it appropriate to institute them in an interim proceeding. As we also noted above, a number of customers have not recently revised their contracts and have been making substantial overruns for the use of human needs customers. While some provision for preventing unauthorized overruns may well be necessary in a permanent curtailment plan, we do not believe we should prescribe one at this time.

Another issue raised by a number of the parties regards our alleged failure to give adequate consideration to environmental matters in prescribing this interim curtail-

ment plan. Our action in prescribing an interim plan was required as an emergency measure because of imminent curtailment on El Paso's system; in providing all parties with an opportunity to be heard before issuing an order, we spoke against the background of our August 22, 1972, 48 FPC 371, order in this docket which stated, in part:

> We do not intend in any way to restrict the scope of our analysis of the environmental impact of El Paso's proposed curtailment plan. Environmental evidence will be presented in this case by any party so desiring. Environmental issues will be briefed with all other relevant issues. The process of analysis of environmental issues will be embodied in the Examiner's initial decision, and will be considered by the Commission, together with all relevant evidence in the record, before it issues its final decision in this and other curtailment proceedings.

In Opinion No. 634 we directed the filing of tariffs which permitted deviation from curtailment procedures when required by environmental problems. Those tariffs have now been filed and are in effect. For the reasons stated in our August 22nd order, and with regard to the limitations of time and the record before us, we concluded that our interim orders could go no further. We will continue to expect, however, the development of a complete environmental record in the hearings on El Paso's permanent curtailment plan, in accord with our August 22nd order.

Finally, many of the parties have made the point that as a result of this plan many customers who should be planning for alternate facilities will no longer have any incentive to do so. While we recognize that this may result, we would warn all customers that this is an interim plan only and those who should be installing alternate facilities but fail

to do so are taking a substantial risk of being cut off with no alternative when a permanent plan is approved.

The Commission further finds:

(1) The assignments of error and grounds for rehearing or modification set forth in the various applications, petitions, and motions listed in Appendix A present no facts or legal principles which would warrant any change in or modification of the Commission's Opinion No. 634 and order issued October 10, 1972 except insofar as that Opinion and order have been clarified above.

(2) It is imperative that the interim curtailment plan be made effective at once and the various motions for stays should be denied.

The Commission orders:

(A) The interim curtailment plan ordered in Opinion No. 634 as filed by El Paso on November 30, 1972 is made effective on the date of the issuance of this Opinion and order.

(B) The various applications, petitions and motions for stays, modification, and rehearing of Opinion No. 634 are denied.

APPENDIX A

El Paso Natural Gas Company, Docket No. RP72-6, Opinion No. 634

11/16/72 Application of Nevada Power Company for rehearing.

11/20/72 Motion of El Paso Natural Gas Company for partial stay of Opinion No. 634, or in the alternative, for immediate clarification.

11/22/72 Application of Southern California Gas Company for rehearing, reconsideration and modification of Opinion No. 634 and motion for stay of the effectiveness of Opinion No. 634.

11/22/72 Application of American Smelting and Refining Company, Compania Minera de Cananea, S.A. De C.V., Inspiration Consolidated Copper Company and Kennecott Copper Corporation for rehearing.

11/24/72 Answer of City of Willcox and Arizona Electric Power Cooperative, Inc. to motion of El Paso of 11/20.

11/24/72 Answer of Johns-Manville Products Corporation to motion of El Paso of 11/20.

11/24/72 Answer of Shell Oil Company to motion of El Paso of 11/20.

11/27/72 Application of San Diego Gas & Electric Company for rehearing, reconsideration, and modification of Opinion No. 634.

11/27/72 Motion of San Diego Gas & Electric Company for stay of Opinion No. 634.

11/27/72 Answer of San Diego Gas & Electric Company to motion of El Paso of 11/20.

11/27/72 Answer of Arizona Public Service Company to motion of El Paso of 11/20.

11/27/72 Response of American Smelting and Refining Company, et al. to motion of El Paso of 11/20.

11/28/72 Answer of Tucson Gas & Electric Company to motion of El Paso of 11/20.

11/27/72 Telegram—Southern California Gas Company—partial response to motion of El Paso—decision should be modified as set forth in Southern California's application for rehearing and motion for stay mailed 11/20/72.

11/29/72 Application for rehearing of the People of the State of California and the Public Utilities Commission of the State of California.

11/29/72 Application for rehearing of Opinion No. 634 by Southern California Edison Company.

11/29/72 Motion of Southern California Edison Company for stay of Opinion No. 634 or in the alternative rejection of tariff schedules which El Paso proposes to file on or before 11/30/72.

11/30/72 Application for rehearing of The Department of Water and Power of the City of Los Angeles.

11/30/72 Application for Rehearing of Pacific Gas & Electric Company.

11/30/72 Application of the Air Pollution Control District of the County of Los Angeles for Rehearing, Reconsideration, and Modification of Opinion No. 634 and the Accompanying Order.

11/30/72 Petition of City of Willcox and Arizona Electric Power Cooperative, Inc. for Rehearing, Modification of Opinion No. 634, Motion for Stay, and Amended Motion for Extraordinary Relief.

12/1/72 Motion of City of Mesa for Immediate Clarification of Opinion No. 634, or in the Alternative for Rehearing.

12/5/72 Response of American Smelting and Refining Company, Compania Minera De Cananea, S.A. De C.V., Inspiration Copper Company and Kennecott Copper Corporation to Motions to Stay Opinion No. 634 and Accompanying Order.

Appendix E

Natural Gas Act § 4 (15 U.S.C. § 717c)

Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation,

or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making

the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

Appendix F

Natural Gas Act § 5 (15 U.S.C. § 717d)

Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. June 21, 1938, c. 556, § 5, 52 Stat. 823.

Appendix G

Natural Gas Act § 19 (15 U.S.C. § 717r)

Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by

filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, that court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole

or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. June 21, 1937, c. 556, § 19, 52 Stat. 831; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Aug. 28, 1958, Pub.L. 85-791, § 19, 72 Stat. 947.